

BRB No. 11-0738 BLA

VIVIAN COBB)
(Widow of CECIL COBB, SR.))
)
Claimant-Respondent)
)
v.)
)
WESTMORELAND COAL COMPANY) DATE ISSUED: 08/30/2012
)
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 on Remand - Awarding Benefits of Linda S. Chapman, Administrative Law Judge, United States Department of Labor.

Jeffrey R. Soukup and William S. Mattingly (Jackson Kelly PLLC), Morgantown, West Virginia, for employer.

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

PER CURIAM:

Employer appeals the Decision and Order on Remand - Awarding Benefits (2008-BLA-6005) of Administrative Law Judge Linda S. Chapman, rendered on a survivor's claim filed on November 9, 2007,¹ 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 her initial Decision and Order, the administrative law

¹ Claimant is the widow of the miner, Cecil Cobb, Sr., who died on August 18, 2007. Director's Exhibit 7.

judge credited the miner with thirty-nine years of coal mine employment and adjudicated the claim pursuant to the regulations contained in 20 C.F.R. Part 718. The administrative law judge then found that the medical evidence of record was sufficient to establish the existence of complicated pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.304 and 718.203(b).² The administrative law judge, therefore, found that claimant established invocation of the irrebuttable presumption of death due to pneumoconiosis at 20 C.F.R. §718.304. Accordingly, the administrative law judge awarded benefits.

In response to employer's appeal, the Board vacated the administrative law judge's award of benefits and remanded the case to the administrative law judge for further consideration of the medical evidence of record. *Cobb v. Westmoreland Coal Corp.*, BRB No. 09-0837 BLA (Sept. 30, 2010)(unpub.). The Board specifically vacated the administrative law judge's finding that the medical evidence established the existence of complicated pneumoconiosis pursuant to Section 718.304 and remanded the case for the administrative law judge to render precise findings regarding the weight she accorded the relevant evidence under each of the subsections at Section 718.304. In particular, the Board instructed the administrative law judge to resolve, and more fully explain, her findings with regard to the conflicts in the autopsy evidence, as well as to render specific findings with regard to the conflicting CT scan evidence. *Cobb*, BRB No. 09-0837 BLA, slip op. at 11. Additionally, the Board instructed the administrative law judge to reconsider and more fully explain her findings regarding the weight she accorded to the conflicting medical opinions as compared to the CT scan evidence. *Cobb*, BRB No. 09-0837 BLA, slip op. at 12. The Board also instructed the administrative law judge that if, on remand, she found the evidence insufficient to establish invocation of the irrebuttable presumption of death due to pneumoconiosis under Section 718.304, 30 U.S.C. §921(c)(3), then she must consider whether claimant has established invocation of the rebuttable presumption of death due to pneumoconiosis pursuant to Section 411(c)(4), 30 U.S.C. §921(c)(4), in light of the recent amendments to the Act.³ Pub. L. No. 111-148,

² The administrative law judge found that the medical evidence "clearly establishes that [the miner] had a disease process in his lungs that, on autopsy was found to be consistent with simple pneumoconiosis, with at least two masses that exceeded 2 cm. in diameter, and which were large enough to appear on his x-rays and CT scans as opacities of at least one centimeter in diameter." Addendum Decision and Order Awarding Benefits dated August 31, 2009 [Decision and Order] at 16. Additionally, the administrative law judge found that the miner's complicated pneumoconiosis arose out of his coal mine employment. *Id.*

³ Section 1556 of Public Law 111-148, 124 Stat. 119 (2010) (to be codified at 30 U.S.C. §921(c)(4)), reinstated the "15-year presumption" of Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4), for claims filed after January 1, 2005, that were pending on or after

§1556, 124 Stat. 119 (2010) (to be codified at 30 U.S.C. §§921(c)(4) and 932(l); *Cobb*, BRB No. 09-0837 BLA, slip op. at 13.⁴

On remand, the administrative law judge set forth the Board's instructions and again discussed the relevant evidence of record. She found that, while the x-ray evidence alone, was insufficient to establish the existence of complicated pneumoconiosis, "the autopsy evidence, as supported by the x-ray and CT scan [evidence]," was sufficient to establish the existence of complicated pneumoconiosis. Further, weighing the evidence as a whole, the administrative law judge found that it was sufficient to establish the existence of complicated pneumoconiosis and, therefore, that it was sufficient to establish invocation of the irrebuttable presumption that the miner's death was due to pneumoconiosis pursuant to Section 718.304. 30 U.S.C. §921(c)(3). Accordingly, the administrative law judge awarded benefits, commencing as of November 2007.

On appeal, employer challenges the administrative law judge's award of benefits, arguing that the administrative law judge erred in finding the evidence sufficient to establish the existence of complicated pneumoconiosis pursuant to Section 718.304. Specifically, employer contends that the administrative law judge erred in considering evidence that was not contained in the record in making her determination and erred in failing to follow the Board's remand instructions in weighing the evidence. Neither claimant, nor the Director, Office of Workers' Compensation Programs (the Director), has filed a response 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 rational, supported by substantial evidence, and in accordance with applicable law.⁵ 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

March 23, 2010. Under Section 411(c)(4), if a survivor establishes that the miner had at least fifteen years of coal mine employment and suffered from a totally disabling respiratory impairment, there is a rebuttable presumption that the miner's death was due to pneumoconiosis.

⁴ We note that the recent amendments to Section 422(l), 30 U.S.C. §932(l), do not apply to the instant case, as the miner was not found entitled to benefits at the time of his death. See Director's Exhibit 1.

⁵ The Board will apply the law of the United States Court of Appeals for the Fourth Circuit, as the miner's last coal mine employment occurred in Virginia. See *Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989)(en banc); Director's Exhibits 3, 5.

(1965).

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 death due to pneumoconiosis if the miner suffered from a chronic dust disease of the lung which, when diagnosed by (a) 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. In addition, the United States Court of Appeals for the Fourth Circuit, within whose jurisdiction this case arises, 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 appear as a greater-than-one-centimeter opacity if it were seen on a chest x-ray. *Director, OWCP v. Eastern Coal Corp. [Scarbro]*, 220 F.3d 250, 255-56, 22 BLR 2-93, 2-100 (4th Cir. 2000); *see Lester v. Director, OWCP*, 993 F.2d 1143, 1145-46, 17 BLR 2-114, 2-117-18 (4th Cir. 1993); *Double B Mining, Inc. v. Blankenship*, 177 F.3d 240, 22 BLR 2-554 (4th Cir. 1999).

However, 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. Thus, in determining whether the evidence establishes complicated pneumoconiosis, the administrative law judge must examine all of the evidence on the issue, i.e., evidence of simple and complicated pneumoconiosis, as well as evidence that pneumoconiosis is not present, and resolve any conflicts in the evidence. *Lester*, 993 F.2d at 1145-46, 17 BLR at 2-117-18; *Gollie v. Elkay Mining Corp.*, 22 BLR 1-306 (2003); *Melnick v. Consolidation Coal Co.*, 16 BLR 1-31 (1991)(en banc).

At the outset, we address employer’s contention that the administrative law judge erred in considering evidence that was not contained in the record to find that complicated pneumoconiosis was established. Specifically, employer argues that the administrative law judge considered two x-ray readings, dated February 11, 2009 and March 3, 2009, that are not in the record and, therefore, it argues that the administrative law judge’s decision is legally defective. *See* Administrative Procedure Act (APA), 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 5 U.S.C. §554(c)(2), 33 U.S.C. §919(d) and 30 U.S.C. §932(a).

In finding that the CT scan evidence supported the autopsy evidence of complicated pneumoconiosis, the administrative law judge relied, in part, on the fact that both Dr. Scott and Dr. Hippensteel found that the CT scans showed large masses or

densities in both upper lobes of the miner's lung. Decision and Order on Remand at 12; Employer's Exhibit 2. The administrative law judge also relied, in part, on an x-ray reading by Dr. Petrozzo of a February 11, 2009 film showing a patchy density in the right upper lung, and on an x-ray reading by Dr. Patel of a March 3, 2009 film showing multiple nodular densities in the upper, middle and lower lung zones, as well as increased interstitial markings. Decision and Order on Remand at 12. In conclusion, the administrative law judge stated:

I find that the evidence overwhelmingly establishes that [the miner] had large masses in both of his upper lungs, which would appear on x-ray as opacities of more than one centimeter in diameter. This is confirmed by the CT scan evidence, **the narrative x-ray evidence**, and the findings by Drs. Sides and Oesterling, who reported that there were two nodules or masses exceeding 2 cm. in [the miner's] right lung.

Id. [emphasis added]. The record, however, does not contain the reports of Drs. Petrozzo and Patel, nor does it contain x-ray reports of films dated February 11, 2009 and March 3, 2009.

In evaluating the record, if the adjudicator misconstrues either the quality or the quantity of relevant evidence, i.e., if the evidentiary analysis does not coincide with the evidence of record, the case must be remanded for reevaluation of the issue to which the evidence is relevant. *Tackett v. Director, OWCP*, 7 BLR 1-703, 1-706 (1985); *Branham v. Director, OWCP*, 2 BLR 1-111, 1-113 (1979). Consequently, because the administrative law judge has considered evidence not contained in the record, we vacate the administrative law judge's finding that the evidence is sufficient to establish the existence of complicated pneumoconiosis at Section 718.304 and remand the case for consideration of only the evidence contained in the record. *See* 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 5 U.S.C. §554(c)(2), 33 U.S.C. §919(d) and 30 U.S.C. §932(a); 20 C.F.R. §§725.414, 725.456(a), (b); *Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162, 1-165 (1989).

On remand, the administrative law judge must reconsider the evidence relevant to each of the individual subsections, in light of the instructions in the Board's prior decision. *See Cobb*, BRB No. 09-0837 BLA, slip op. at 9-12. Specifically, the administrative law judge must resolve the conflicts in the autopsy evidence, as previously instructed by the Board, not merely referencing the size of the masses, but also their location and nature, in determining whether the autopsy/pathology evidence is sufficient to establish the existence of complicated pneumoconiosis. *See Cobb*, BRB No. 09-0837 BLA, slip op. at 10-11. Likewise, the administrative law judge must more fully explain whether the large masses described in the autopsy/pathology evidence and the CT scan

evidence would appear, if seen on an x-ray, as greater than one centimeter.⁶ *See Cobb*, BRB No. 09-0837 BLA, slip op. at 11, citing *Scarbro*, 220 F.3d at 255-56, 22 BLR at 2-100. In addition, the administrative law judge must render specific findings with respect to the conflicting CT scan evidence, and must fully discuss her weighing of the medical opinion evidence pursuant to the instructions provided in the Board's prior decision.⁷ *See Cobb*, BRB No. 09-0837 BLA, slip op. at 12, citing *Scarbro*, 220 F.3d at 2-255-56, 22 BLR at 2-100; *Blankenship*, 177 F.3d at 243-44, 22 BLR at 2-555-56. Consequently, we remand the case for further consideration under Section 411(c)(3), 30 U.S.C. §921(c)(3), as implemented by 20 C.F.R. §718.304, and consideration under amended Section 411(c)(4), 30 U.S.C. §921(c)(4), if reached. *See Cobb*, BRB No. 09-0837 BLA, slip op. at 13.

⁶ The Board specifically instructed the administrative law judge that “the equivalency determination requires medical evidence establishing that the masses would appear on x-ray, not on CT scan, as greater than one centimeter.” *Cobb v. Westmoreland Coal Corp.*, BRB No. 09-0837 BLA (Sept. 30, 2010)(unpub.), slip op. at 11.

⁷ In discussing the administrative law judge's findings regarding the medical opinion evidence at 20 C.F.R. §718.304(c), the Board instructed that administrative law judge that:

Because Drs. Winegar, Spagnolo and Hippensteel reviewed x-ray interpretations, autopsy findings and CT scan readings rendered by other physicians, their conclusions regarding the significance of this evidence should be considered under the subsection applicable to that evidence.

Decision and Order on Remand at 12.

Accordingly, the administrative law judge's Decision and Order on Remand - Awarding Benefits is vacated and the case is remanded to the administrative law judge for further consideration consistent with this opinion.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge