BRB No. 11-0797 BLA

JIM SIMPSON	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
SENECA ENERGY, LLC	)	
	)	
and	)	
	)	
KENTUCKY EMPLOYERS MUTUAL INSURANCE	)	DATE ISSUED: 08/30/2012
	)	
Employer/Carrier-Petitioners	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Order on Remand - Award of Benefits of Daniel F. Solomon, Administrative Law Judge, United States Department of Labor.

Paul E. Jones and James W. Herald, III (Jones, Walters, Turner & Shelton PLLC), Pikeville, Kentucky, for employer/carrier.

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

PER CURIAM:

Employer appeals the Order on Remand - Award of Benefits (2009-BLA-05120) of Administrative Law Judge Daniel F. Solomon rendered on a claim filed on October 31, 2005, pursuant to 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 claim is on appeal to the Board for the second time.

Initially, the administrative law judge adjudicated this claim under the regulations at 20 C.F.R. Part 718 and found that the x-ray evidence established the existence of complicated pneumoconiosis pursuant to 20 C.F.R. §718.304(a) and the existence of complicated pneumoconiosis pursuant to 20 C.F.R. §718.304 overall. Further, crediting claimant with at least eighteen years of coal mine employment, as stipulated by the parties, the administrative law judge concluded that claimant was entitled to the presumption that the complicated pneumoconiosis arose out of coal mine employment pursuant to 20 C.F.R. §718.203(b). Accordingly, the administrative law judge found that claimant was entitled to invocation of the Section 411(c)(3) irrebuttable presumption of total disability due to pneumoconiosis, 30 U.S.C. §921(c)(3), and awarded benefits on the claim.

Pursuant to employer's appeal, the Board affirmed the administrative law judge's weighing of the x-ray evidence and his finding that it established the existence of complicated pneumoconiosis pursuant to 20 C.F.R. §718.304(a). *Simpson v. Seneca Energy, LLC*, BRB No. 10-0154 BLA (Oct. 29, 2010) (unpub.). However, the Board agreed with employer that the administrative law judge erred in failing to consider whether the CT scan and medical opinion evidence established the existence of complicated pneumoconiosis pursuant to 20 C.F.R. §718.304(c) and in failing to weigh all of the relevant evidence together, before finding the existence of complicated pneumoconiosis established pursuant to Section 718.304.[1] Additionally, the Board held that the administrative law judge failed to comply with the Administrative Procedure Act (APA)[2] by not explaining the weight he accorded the conflicting evidence on the issue of complicated pneumoconiosis, and in not explaining how he resolved that conflict.[3] The

[1] There is no evidence in the record that could support a finding of complicated pneumoconiosis pursuant to 20 C.F.R. §718.304(b).

[2] The Administrative Procedure Act requires that every adjudicatory decision be accompanied by a statement of "findings and conclusions, and the reasons or basis therefor, on all material issues of fact, law, or discretion presented on the record." 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); *see Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162 (1989).

[3] As the Board noted, the record contains the following evidence relevant to 20 C.F.R. §718.304(c): Dr. Wheeler read CT scans dated May 25, 2005, October 31, 2005 and February 1, 2006 as negative for the existence of "coal workers' pneumoconiosis." Director's Exhibit 17. Dr. Burrell examined claimant on January 9, 2006, at the request of the Department of Labor, and diagnosed complicated pneumoconiosis and emphysema, both of which he attributed to claimant's coal mine employment. Director's

Board, therefore, vacated the administrative law judge's finding that the existence of complicated pneumoconiosis was established pursuant to Section 718.304 and his award of benefits, and remanded this case for further proceedings.[4] Specifically, the Board instructed the administrative law judge that, in considering whether claimant has established complicated pneumoconiosis pursuant to Section 718.304 and is, therefore, entitled to invocation of the irrebuttable presumption of total disability due to pneumoconiosis, he must weigh the CT scan and medical opinion evidence at 20 C.F.R. §718.304(c), and determine whether it establishes complicated pneumoconiosis. The Board further instructed the administrative law judge that he must then weigh all of the evidence supportive of a finding of complicated pneumoconiosis, against any contrary

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Exhibit 12. Dr. Dahhan examined claimant on August 28, 2006 and opined that, while claimant has simple coal workers' pneumoconiosis, he does not have complicated pneumoconiosis. Director's Exhibit 15. Dr. Dahhan stated that the "pulmonary function studies . . . showed normal [s]pirometry, lung volumes and diffusion capacity, all arguing against the presence of complicated coal workers' pneumoconiosis." *Id*. Dr. Vuskovich submitted a report dated April 28, 2009, based on his review of claimant's medical records and the x-ray evidence. Employer's Exhibit 4. He noted that claimant's medical history included a diagnosis of dermatomyositis, a connective tissue disease, which can mimic either simple or complicated pneumoconiosis and "can cause a variety of chest imaging stud[y] appearances including nodules, fibrosis, areas of consolidation and opacities." *Id*. Dr. Vuskovich also opined that claimant does not have complicated pneumoconiosis, as he has no pulmonary impairment. *Id*.; *see Simpson v. Seneca Energy, LLC*, BRB No. 10-0154 BLA, slip op. at 6 n.5 (Oct. 29, 2010)(unpub.).

[4] Based on the filing date of this claim, the Board further held that claimant would be entitled to invocation of the Section 411(c)(4) rebuttable presumption of total disability due to pneumoconiosis if at least fifteen years of qualifying coal mine employment were established and the miner established that he has a totally disabling respiratory impairment. 30 U.S.C. §921(c)(4). However, because the administrative law judge found, on remand, that the evidence did not establish total respiratory disability, claimant is not entitled to invocation of the Section 411(c)(4) presumption in this case. Order at 4. Because that finding is unchallenged on appeal, it is affirmed. *Skrack v. Island Creek Coal Co*., 6 BLR 1-710, 1-711 (1983).

Further failure to establish total respiratory disability precludes a finding of entitlement under the Act, *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986) (en banc), unless the evidence establishes the existence of complicated pneumoconiosis, thereby providing claimant the benefit of the irrebuttable presumption of total disability due to pneumoconiosis pursuant to 20 C.F.R. §718.304.

evidence, before determining whether complicated pneumoconiosis is established pursuant to Section 718.304, with the burden of proof resting on claimant to establish complicated pneumoconiosis. Additionally, the Board instructed the administrative law judge that, if he determines that complicated pneumoconiosis is established, he must then determine whether the complicated pneumoconiosis arose out of coal mine employment pursuant to 20 C.F.R. §718.203(b). Further, the Board directed the administrative law judge to render findings in compliance with the APA.

On remand, the administrative law judge again determined that complicated pneumoconiosis was established pursuant to Section 718.304 overall, based on the x-ray evidence. Further, the administrative law judge again found claimant entitled to the presumption that the complicated pneumoconiosis arose out of coal mine employment pursuant to Section 718.203(b). Accordingly, the administrative law judge again awarded benefits.

On appeal, employer argues that the administrative law judge erred in shifting the burden of proving the existence of complicated pneumoconiosis to employer. Employer also contends that the administrative law judge again failed to properly weigh all the relevant evidence together before finding that complicated pneumoconiosis was established pursuant to Section 718.304 overall.[5] Claimant has not filed a response brief. The Director, Office of Workers' Compensation Programs, states the he will not file a substantive response to employer's appeal, unless specifically requested to do so by the Board.

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.[6] 33 U.S.C. §921(b)(3), as incorporated into the Act by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman and Grylls Associates, Inc.*, 380 U.S. 359 (1965).

[5] Employer's argument that the administrative law judge failed to properly weigh the x-ray evidence is unavailing. When this case was previously before the Board, the administrative law judge's finding that claimant established the existence of complicated pneumoconiosis by x-ray evidence pursuant to 20 C.F.R. §718.304(a) was affirmed. Thus, that finding constitutes the law of the case, *see Brinkley v. Peabody Coal Co.*, 14 BLR 1-147, 1-150-51 (1990), and we will not address it further.

[6] This case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit, as claimant's coal mine employment was in Kentucky. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989)(en banc); Director's Exhibit 3.

Section 411(c)(3) of the Act, as implemented by 20 C.F.R. §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 introduction of legally sufficient evidence of complicated pneumoconiosis does not, however, automatically qualify a claimant for the irrebuttable presumption found at 20 C.F.R. §718.304. Rather, the administrative law judge, as fact-finder, must examine all the relevant evidence, *i.e*., evidence of simple and complicated pneumoconiosis, as well as evidence that pneumoconiosis is not present, resolve any conflict, and make a finding of fact. *See Gray v. SLC Coal Co*, 176 F.3d 382, 389, 21 BLR 2-615, 2-628-29 (6th Cir. 1999); *Lester v. Director, OWCP*, 993 F.2d 1143, 17 BLR 2-114 (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).

We agree with employer that the administrative law judge's analysis pursuant to 20 C.F.R §718.304 erroneously shifted the burden of proof to employer. The administrative law judge's statement that "the presumption in Section 718.304 is invoked, and in this record the burden is on [e]mployer to rule out pneumoconiosis, and I find that it failed to do so," misstates the burden of proof. *See Director, OWCP v. Greenwich Collieries* [*Ondecko*], 512 U.S. 267, 281, 18 BLR 2A-1, 2A-12 (1994); *Morrison v. Tenn. Consol. Coal Co.*, 644 F.3d 473, 25 BLR 2-1 (6th Cir. 2011); *Melnick v. Consolidation Coal Co.*, 16 BLR 1-33-34; Order at 5. The administrative law judge's finding of complicated pneumoconiosis is, therefore, vacated and the case is remanded for reconsideration.

Further, we agree with employer that the administrative law judge failed to weigh together all of the relevant evidence before determining that the existence of complicated pneumoconiosis was established pursuant to Section 718.304 overall.[7] On remand, the

[7] The administrative law judge, within his discretion, found that employer did not present evidence demonstrating that the proffered CT scans are "medically acceptable and relevant," pursuant to 20 C.F.R. §718.107(b). The administrative law judge, therefore, declined to consider the CT scan evidence pursuant to 20 C.F.R. §718.304(c). *See Webber v. Peabody Coal Co*., 23 BLR 1-123 (2006)(en banc)(Boggs, J., concurring), *aff'd on recon*., 24 BLR 1-1 (2007)(en banc); *Harris v. Old Ben Coal Co*., 23 BLR 1-98 (2006)(en banc)(McGranery & Hall, JJ., concurring and dissenting), *aff'd on recon*., 24 BLR 1-13 (2007)(en banc)(McGranery & Hall, JJ., concurring and dissenting); *Dempsey v. Sewell Coal Corp*., 23 BLR 1-47 (2004)(en banc); Decision and Order at 2, 5. As that finding is unchallenged on appeal, it is affirmed. *Skrack*, 6 BLR at 1-711.

administrative law judge must address whether the relevant evidence in each category delineated at Section 718.304, establishes the existence of complicated pneumoconiosis at the appropriate subsection and must then weigh together all of the relevant evidence in determining whether the existence of complicated pneumoconiosis is established pursuant to Section 718.304 overall.[8] *See Gray*, 176 F.3d at 388, 21 BLR at 2-626; *see also Braenovich v. Cannelton Industries, Inc./Cypress Amax*, 22 BLR 1-236, 1-245 (2003); *Melnick*, 16 BLR at 1-31. Consequently, although the administrative law judge properly found complicated pneumoconiosis established by x-ray evidence pursuant to Section 718.304(a), he failed to determine whether the medical opinion evidence established complicated pneumoconiosis pursuant to Section 718.304(c), and to then weigh the x-ray evidence and the medical opinion evidence together before determining whether complicated pneumoconiosis was established pursuant to Section 718.304 overall.[9] *See Melnick*, 16 BLR at 1-33. On remand, therefore, the administrative law judge must weigh all of the relevant evidence together before determining that complicated pneumoconiosis is established pursuant to Section 718.304 overall. In considering this case on remand, the administrative law judge is instructed to explain the bases for his credibility determinations, and his findings of fact and conclusions of law in accordance with the APA. *See Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162, 1-165 (1989).

[8] The administrative law judge permissibly accorded less weight to the opinion of Dr. Dahhan as the doctor relied on his x-ray reading, which conflicted with the x-ray evidence that established complicated pneumoconiosis. *See Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(en banc). In finding that Dr. Vuskovich's opinion did not outweigh the x-ray evidence establishing the existence of complicated pneumoconiosis, however, the administrative law judge discussed the opinion in terms of whether Dr. Vuskovich's diagnosis of dermatomyositis established the existence of legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(2), and not whether it supported or refuted the x-ray evidence establishing the existence of complicated pneumoconiosis. *See* 20 C.F.R. §718.304.

[9] Because 20 C.F.R. §718.304 provides an *irrebuttable* presumption of total disability due to pneumoconiosis by its own terms, it does not implicate a scheme of invocation and rebuttal, so as to necessitate a shift in the burden of proof. *See Melnick v. Consolidation Coal Co.*, 16 BLR 1-31 (1991)(en banc).

Accordingly, the administrative law judge's Order on Remand - Award of Benefits is affirmed in part, 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