BRB No. 05-0429 BLA

IMA JOE WADE (Widow of JAMES W. WADE) Claimant-Respondent v. NEW HIGNITE COAL COMPANY, INCORPORATED Employer-Petitioner DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	)	DATE ISSUED: 12/28/2005 DECISION and ORDER

Appeal of the Decision and Order of Rudolf L. Jansen, Administrative Law Judge, United States Department of Labor.

Stephen A. Sanders (Appalachian Citizens Law Center, Inc.), Prestonsburg, Kentucky, for claimant.

Ronald E. Gilbertson (Bell, Boyd & Lloyd, PLLC), Washington, D.C., for employer.

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

PER CURIAM:

Employer appeals the Decision and Order (03-BLA-6130) of Administrative Law Judge Rudolf L. Jansen awarding benefits on a survivor's 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). The administrative law judge found that employer was the proper responsible operator and that the parties stipulated to eighteen

years of coal mine employment.[1] Decision and Order at 4, 6-7. Considering entitlement in this survivor's claim[2] pursuant to the provisions of 20 C.F.R. Part 718, the administrative law judge determined that the evidence of record established the existence of complicated pneumoconiosis pursuant to 20 C.F.R. §718.304 and thus that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c)(3). Decision and Order at 8. Accordingly, the administrative law judge awarded benefits.

On appeal, employer contends that the administrative law judge erred in his analysis of the medical evidence when he found the existence of complicated pneumoconiosis established. Claimant responds, urging affirmance of the administrative law judge's award of benefits as supported by substantial evidence. Employer has filed a reply brief reiterating its position. The Director, Office of Workers' Compensation Programs has filed a letter indicating that he will not respond to this appeal.[3]

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).

In order to establish entitlement to benefits pursuant to 20 C.F.R. Part 718 in a survivor's claim filed after January 1, 1982, claimant must establish that the miner suffered from pneumoconiosis arising out of coal mine employment and that the miner's death was due to pneumoconiosis. *See* 20 C.F.R. §§718.1, 718.202, 718.203, 718.205, 725.201; *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85 (1993). Death will be considered to be due to pneumoconiosis if pneumoconiosis was the cause of the miner's death, if pneumoconiosis was a substantially contributing cause or factor leading to the miner's death, if death was caused by complications of pneumoconiosis, or if the presumption relating to complicated pneumoconiosis, set forth at Section 718.304, is

[1] The record indicates that the miner's coal mine employment occurred in Kentucky. Director's Exhibits 3, 5. Accordingly, this case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*).

[2] Claimant is Ima Joe Wade, the miner's widow. The miner, James W. Wade, died on November 3, 2000 and claimant filed her survivor's claim on July 26, 2001. Director's Exhibit 2.

[3] The administrative law judge's length of coal mine employment and responsible operator determinations are affirmed as unchallenged on appeal. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

applicable. 20 C.F.R. §718.205(c)(1)-(3). Pneumoconiosis is a "substantially contributing cause" of a miner's death if it hastens the miner's death. *See* 20 C.F.R. §718.205(c)(5); *Griffith v. Director, OWCP*, 49 F.3d 184, 19 BLR 2-111 (6th Cir. 1995); *Brown v. Rock Creek Mining Co., Inc.*, 996 F.2d 812, 17 BLR 1-135 (6th Cir. 1993).

Employer contends that the administrative law judge erred in invoking the irrebuttable presumption that the miner died due to pneumoconiosis, because the administrative law judge did not consider all relevant evidence or explain his findings when he determined that the existence of complicated pneumoconiosis was established. Employer's contentions have merit.

Section 411(c)(3)(A) of the Act, implemented by Section 718.304(a) of the regulations, provides that there is an irrebuttable presumption that a miner's death was 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 which would yield results equivalent to (A) or (B). 30 U.S.C. §921(c)(3)(A); 20 C.F.R. §718.304(a). Before determining whether invocation of the irrebuttable presumption has been established, the administrative law judge shall first determine whether the evidence in each category under Section 718.304(a)-(c) tends to establish the existence of complicated pneumoconiosis, and then must weigh together all relevant evidence pursuant to Section 718.304(a)-(c). *See Gray v. SLC Coal Co.*, 176 F.3d 382, 21 BLR 2-615 (6th Cir. 1999); *Melnick v. Consolidation Coal Co.*, 16 BLR 1-31 (1991)(*en banc*). The administrative law judge in this case considered x-ray readings, hospitalization records, and medical reports.

As an initial matter, employer contends that the administrative law judge violated the Administrative Procedure Act (APA), 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 30 U.S.C. §932(a), by means of 33 U.S.C. §919(d) and 5 U.S.C. §554(c)(2), by failing to make specific findings under Section 718.304(a)-(c) or to explain which of the statutory criteria for complicated pneumoconiosis claimant met in this case and why. Employer's Brief at 8. We agree. Review of the administrative law judge's Decision and Order does not reveal a specific finding as to the weight of the evidence in any particular category of Section 718.304. Moreover, although it appears that the administrative law judge found the x-ray evidence to be in equipoise, we are unable to discern how he found the positive x-ray readings to be supported by unspecified medical treatment opinions and hospitalization reports referred to by the administrative law judge. Decision and Order at 8. Therefore, and for the additional reasons that follow, we must vacate the administrative law judge's finding that complicated pneumoconiosis was established and remand this case for him to make specific findings under Section 718.304. *See Director, OWCP v. Congleton*, 743 F.2d 428, 430, 7 BLR 2-12, 2-15-16 (6th Cir. 1984).

Pursuant to Section 718.304(a), the administrative law judge had before him four x-ray readings that were ILO-classified for the presence or absence of pneumoconiosis. Dr. Barrett, who is a Board-certified radiologist and B-reader, read the May 25, 2000 x-ray as positive for simple pneumoconiosis and indicated the presence of "Category A" large opacities. Director's Exhibit 10. By contrast, Dr. Spitz, who is also a Board-certified radiologist and B-reader, read the May 25, 2000 x-ray as positive for simple pneumoconiosis and indicated that no Category A, B, or C large opacities were present, by checking "O" on that part of the x-ray classification form. Director's Exhibit 23. Additionally, Dr. Barrett read the November 2, 2000 x-ray as positive for simple pneumoconiosis with "Category A" large opacities, while Dr. Spitz classified this x-ray as unreadable, because it was a "portable" x-ray that was overexposed. Director's Exhibit 23.

In weighing these x-rays, the administrative law judge found that "[n]o evidence of record directly refutes a finding of complicated pneumoconiosis." Decision and Order at 8. As employer argues, however, substantial evidence does not support this finding, because Dr. Spitz indicated that no Category A, B, or C opacities were present on the May 25, 2000 x-ray. Director's Exhibit 23; Employer's Brief at 5, 11, 14. Additionally, the administrative law judge found that, because Drs. Barrett and Spitz possess "equal" radiological credentials, "the readings of one do not deserve additional weight over the other." Decision and Order at 8. This analysis would seem to indicate that the x-ray interpretations were in equipoise, a finding that can not support claimant's burden at Section 718.304(a) to establish the existence of complicated pneumoconiosis by a preponderance of the evidence. *See Director, OWCP v. Greenwich Collieries [Ondecko]*, 512 U.S. 267, 18 BLR 2A-1 (1994); Employer's Brief at 11. The administrative law judge noted further, however, that Dr. Woodring, a hospital radiologist, stated that he read a 1999 x-ray as reflecting "early development of progressive massive fibrosis," which, the administrative law judge observed, "may be considered a finding of complicated pneumoconiosis . . . ."[4] Decision and Order at 6, 8; citing 65 Fed.Reg. 79951 (Dec. 20, 2000). But, as employer argues, Dr. Woodring did not diagnose "large opacities (greater than one centimeter in diameter) classified as Category A, B, or C." 30 U.S.C. §921(c)(3)(A). Employer's Brief at 16 n.1. Thus, Dr. Woodring's notation was not x-ray evidence of complicated pneumoconiosis pursuant to Section 718.304(a). On remand, the administrative law judge should reconsider the x-ray readings pursuant to Section 718.304(a) and determine whether the x-ray evidence supports a finding of the existence of complicated pneumoconiosis. *See Melnick*, 16 BLR at 1-33.

[4] Employer states that the x-ray referred to was dated November 24, 1999, and notes that "numerous" other hospital x-rays in the record made no mention of progressive massive fibrosis. Employer's Brief at 16 n.1.

Because the record contains no biopsy or autopsy evidence, the other method by which claimant could establish the existence of complicated pneumoconiosis was with other evidence yielding results equivalent to either x-ray or biopsy/autopsy evidence. 20 C.F.R. §718.304(c); *see Gray*, 176 F.3d at 390; 21 BLR at 2-630.

The administrative law judge reviewed medical reports by Drs. Dahhan and Fino diagnosing claimant with coal workers' pneumoconiosis, but not complicated pneumoconiosis. Director's Exhibits 22, 27. The administrative law judge also considered hospitalization records in which the miner was diagnosed with and treated for multiple conditions. Director's Exhibit 9. Review of these records does not disclose a diagnosis of complicated pneumoconiosis, with the possible exception of Dr. Woodring's notation discussed above. The administrative law judge found that Drs. Fino and Dahhan "did not dispute the existence of pneumoconiosis," and determined that "additional medical opinion evidence from attending physicians and the hospitalization reports dated close to the time the miner died support Dr. Barrett's finding of complicated pneumoconiosis." Decision and Order at 8.

As employer argues, the administrative law judge did not cite to any specific medical opinion or hospital record supporting a diagnosis of complicated pneumoconiosis pursuant to Section 718.304(c), or weigh the evidence in accordance with *Melnick*. Decision and Order at 8; Employer's Brief at 14-16. Further, to the extent the administrative law judge relied on Dr. Woodring's notation of "progressive massive fibrosis," the administrative law judge first had to determine whether Dr. Woodring's diagnosis could reasonably be expected to yield the results described in Section 718.304(a) or (b). *See* 20 C.F.R. §718.304(c); *see Gray*, 176 F.3d at 390; 21 BLR at 2-630; Employer's Brief at 12. Therefore, on remand, the administrative law judge should reconsider the other medical evidence pursuant to Section 718.304(c) and determine whether it supports a finding of the existence of complicated pneumoconiosis. *See Melnick*, 16 BLR at 1-33.

On remand the administrative law judge must first determine whether the evidence in each category at Sections 718.304(a) and (c) tends to establish the existence of complicated pneumoconiosis, and then weigh the evidence supportive of a finding of complicated pneumoconiosis against the contrary probative evidence, with the burden of proof on claimant. *See Ondecko*, 512 U.S. at 281, 18 BLR at 2A-12; *Melnick*, 16 BLR at 1-33. If the administrative law judge finds that the evidence does not establish the existence of complicated pneumoconiosis, then he must determine if the evidence of record establishes that the miner's death was due to pneumoconiosis pursuant to Section 718.205(c).

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