BRB No. 07-0276 BLA

R. W.	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
RANGER FUEL CORPORATION	)	
	)	DATE ISSUED: 12/21/2007
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 Michael P. Lesniak, Administrative Law Judge, United States Department of Labor.

Joseph E. Wolfe (Wolfe, Williams & Rutherford), Norton, Virginia, for claimant.

Francesca Tan (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 (03-BLA-6253) of Michael P. Lesniak rendered on a subsequent 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] This case has been before the Board

[1] Claimant filed his first claim for benefits on April 5, 1988, which was denied on September 15, 1998, because claimant did not establish that he was totally disabled by a respiratory or pulmonary impairment. Director's Exhibit 1. Claimant took no further

previously. Initially, the administrative law judge credited claimant with sixteen and one-half years of coal mine employment[2] and found that the medical evidence developed since the previous denial of benefits established the existence of simple pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.202(a), 718.203(b). The administrative law judge further found that the new medical evidence established the existence of complicated pneumoconiosis, thereby entitling claimant to the irrebuttable presumption that he is totally disabled due to pneumoconiosis pursuant to 20 C.F.R. §718.304. The administrative law judge therefore found that claimant established a change in an applicable condition of entitlement since the date upon which the denial of his prior claim became final, as required by 20 C.F.R. §725.309(d). Accordingly, the administrative law judge awarded benefits.

Pursuant to employer's appeal, the Board vacated the administrative law judge's finding that the x-ray evidence established the existence of simple pneumoconiosis at 20 C.F.R. §718.202(a)(1), because the administrative law judge had based that finding solely on a count of the number of physicians rendering positive interpretations of claimant's new x-rays. The Board remanded the case for the administrative law judge to instead consider the positive and negative x-ray interpretations of each individual x-ray in light of the readers' radiological qualifications. *Wyatt v. Ranger Fuel Corp.*, BRB No. 05-0371 BLA, slip op. at 7 (Jan. 30, 2006)(unpub.). The Board further instructed that if the administrative law judge found that the x-ray evidence established the existence of simple pneumoconiosis, he should then weigh all of the relevant evidence together at 20 C.F.R. §718.202(a), to determine whether the existence of simple pneumoconiosis was established, pursuant to *Island Creek Coal Co. v. Compton*, 211 F.3d 203, 22 BLR 2-162 (4th Cir. 2000). *Id*. Additionally, because the administrative law judge committed the same error in regard to his consideration of whether the new x-ray evidence established the existence of complicated pneumoconiosis that he had committed when considering whether the x-ray evidence established the existence of simple pneumoconiosis, the Board vacated the administrative law judge's finding that the x-ray evidence established the existence of complicated pneumoconiosis at 20 C.F.R. §718.304(a), and remanded the case for the administrative law judge to reweigh the x-ray evidence. *Wyatt*, slip op. at 9.

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action on that claim. Claimant filed his second claim on July 3, 1990, which was denied on May 18, 1993, because claimant did not establish that he was totally disabled. *Id.* Claimant took no further action on that claim. Claimant filed his current claim on August 21, 2001. Director's Exhibit 3.

[2] The record indicates that claimant's coal mine employment occurred in West Virginia. 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*); Director's Exhibit 4.

Further, the Board vacated the administrative law judge's finding that the CT scan evidence did not establish the existence of complicated pneumoconiosis at 20 C.F.R. §718.304(c), and remanded the case for the administrative law judge to require employer to select and submit, pursuant to 20 C.F.R. §718.107(b), only one reading of the December 13, 2000 CT scan, and to consider it with any supporting evidence, and in conjunction with any rebuttal evidence submitted by claimant. *Wyatt*, slip op. at 11-12. The Board instructed the administrative law judge that, once employer had made its selection, the administrative law judge should reconsider the CT scan evidence pursuant to 20 C.F.R. §718.304(c). In view of the Board's determination to vacate the administrative law judge's finding pursuant to 20 C.F.R. §718.304, the Board also vacated the finding that a change in an applicable condition was established pursuant to 20 C.F.R. §725.309(d).

On remand, the administrative law judge found that the weight of the new x-ray evidence supported a finding of simple pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1), and that the medical opinion evidence was "unanimous" that claimant has simple pneumoconiosis, pursuant to 20 C.F.R. §718.202(a)(4). The administrative law judge further found that the one positive and one negative reading of a December 13, 2000 CT scan submitted by claimant and employer were in equipoise, and thus, did not support a finding of pneumoconiosis. The administrative law judge concluded that, when weighed together, the x-rays, medical opinions, and CT scan readings established the existence of simple pneumoconiosis by a preponderance of the evidence. Having determined that the evidence established the existence of simple pneumoconiosis, the administrative law judge considered whether the new evidence established the existence of complicated pneumoconiosis pursuant to 20 C.F.R. §718.304. The administrative law judge found that a preponderance of the new x-ray evidence established the existence of complicated pneumoconiosis at 20 C.F.R §718.304(a). Further, the administrative law judge credited the positive x-ray evidence over the two CT scan readings. The administrative law judge concluded that claimant was entitled to the irrebuttable presumption pursuant to 20 C.F.R. §718.304, and had established a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309(d). Accordingly, the administrative law judge awarded benefits.

On appeal, employer contends that the administrative law judge erred in finding that the x-ray evidence established both simple and complicated pneumoconiosis, because the administrative law judge failed to consider all of the relevant evidence. Employer further asserts that the administrative law judge did not adequately explain his finding that all of the evidence weighed together established the existence of simple pneumoconiosis. Employer also contends that the administrative law judge erred in his analysis of the CT scan evidence when he found that complicated pneumoconiosis was

established. Claimant responds, urging affirmance of the award of benefits.[3] The Director, Office of Workers' Compensation Programs, has indicated that he will not file a substantive response to employer's appeal.[4]

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. 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 (1965).725.309.

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).

Where a miner files a claim for benefits more than one year after the final denial of a previous claim, the subsequent claim must also be denied unless the administrative law judge finds that "one of the applicable conditions of entitlement . . . has changed since the date upon which the order denying the prior claim became final." 20 C.F.R. §725.309(d); *White v. New White Coal Co.,* 23 BLR 1-1, 1-3 (2004). The "applicable conditions of entitlement" are "those conditions upon which the prior denial was based." 20 C.F.R. §725.309(d)(2). Claimant's prior claim was denied because he failed to establish that he was totally disabled by a respiratory or pulmonary impairment. Director's Exhibit 1. Consequently, claimant had to submit new evidence establishing that he is totally disabled. 20 C.F.R. §725.309(d)(2),(3). The administrative law judge found that the new evidence developed with the subsequent claim established invocation of the irrebuttable presumption that claimant is totally disabled due to pneumoconiosis. In so doing, the administrative law judge first considered whether the evidence established the existence of simple pneumoconiosis.

[3] On November 9, 2007, claimant filed a response brief, accompanied by a motion to accept his brief although it was filed out of time, due to an oversight. Claimant's response brief is hereby accepted as part of the record before the Board. 20 C.F.R. §802.217.

[4] The administrative law judge's finding that the CT scan readings were in equipoise and thus did not support a finding of pneumoconiosis, and that the medical opinions supported a finding of pneumoconiosis, are affirmed as unchallenged on appeal. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

Employer contends that the administrative law judge erred in finding the x-ray evidence sufficient to establish the existence of simple pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1). Specifically, employer contends that the administrative law failed to consider Dr. Zaldivar's interpretation of the March 13, 2002 x-ray and Dr. Wiot's interpretation of the November 2, 2002 x-ray, both of which were positive for simple pneumoconiosis, but negative for complicated pneumoconiosis. Director's Exhibits 13, 14. This contention has merit. However, as set forth below, the administrative law judge's failure to consider these two positive readings constituted harmless error with respect to his finding that the preponderance of the x-ray readings supported a finding of simple pneumoconiosis.

Specifically, the administrative law judge considered eight readings of four new x-rays. As summarized by the administrative law judge, the October 29, 2001 x-ray was read as positive for simple pneumoconiosis with category A large opacities, by Dr. Patel, a B reader and Board-certified radiologist, and as negative for both simple and complicated pneumoconiosis by Dr. Wheeler, a B reader and Board-certified radiologist.[5] Director's Exhibit 18; Employer's Exhibit 7. The August 31, 2002 x-ray was read as positive for simple pneumoconiosis with category A large opacities, by Dr. DePonte, a B reader and Board-certified radiologist, and as negative for both simple and complicated pneumoconiosis by Dr. Wheeler, a B reader and Board certified radiologist. Director's Exhibit 21; Employer's Exhibit 7. The November 5, 2002 x-ray was read as positive for simple pneumoconiosis with category A large opacities, by Dr. Willis, a B reader. Claimant's Exhibit 4. The February 13, 2003 x-ray was read as positive for simple pneumoconiosis with category A opacities, by Dr. Alexander, a B reader and Board-certified radiologist, and as negative for both simple and complicated pneumoconiosis by Dr. Wheeler, a B reader and Board-certified radiologist. Employer's Exhibit 7; Claimant's Exhibit 3.

The administrative law judge noted that the October 29, 2001, August 31 2002, and February 13, 2002 x-rays were each read as positive and negative by physicians qualified as both B readers and Board certified radiologists. The administrative law judge noted that the November 5, 2002 x-ray was read only as positive for pneumoconiosis. The administrative law judge found that, despite Dr. Wheeler's "great expertise," the positive readings of four separate x-rays by four separate physicians "len[t] additional credibility to" each other, and thus supported a finding of simple pneumoconiosis by a "slight preponderance" of the evidence. Decision and Order on Remand at 4.

[5] Dr. Binns, a B reader and Board-certified radiologist, read the October 29, 2001 x-ray for its film quality only. Director's Exhibit 19.

Although, as employer contends, the record contained two additional x-ray readings from Drs. Zaldivar and Wiot that were not considered by the administrative law judge, the record reflects that both of these readings were classified as positive for simple pneumoconiosis.[6] Director's Exhibits 13, 14. Thus, the administrative law judge's oversight was harmless error. *See Larioni v. Director, OWCP*, 6 BLR 1-1276 (1983). As employer raises no other challenge to the administrative law judge's finding that the preponderance of the x-ray evidence supported a finding of the existence of simple pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1), the finding is affirmed.

Employer also contends that the administrative law judge failed to adequately explain his weighing together of the evidence at 20 C.F.R. §718.202(a) under *Compton*, in violation of 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). Employer's Brief at 10. We disagree. The administrative law judge adequately explained that a "preponderance" of the overall evidence established the existence of simple pneumoconiosis, considering that the x-rays and medical opinions supported a finding of simple pneumoconiosis, while the two CT scan readings were in equipoise. We therefore reject employer's allegation of error and affirm the administrative law judge's finding that the existence of simple pneumoconiosis was established pursuant to 20 C.F.R. §718.202(a).

Pursuant to 20 C.F.R. §718.304(a), employer contends that, in determining that the x-ray evidence established the existence of complicated pneumoconiosis, the administrative law judge failed to consider the interpretations of the March 13, 2002 and November 5, 2002 x-rays by Drs. Zaldivar and Wiot. This contention has merit. Further, unlike the situation with the administrative law judge's finding of simple pneumoconiosis, the administrative law judge's oversight was not harmless with regard to his finding that complicated pneumoconiosis was established. Specifically, Dr. Zaldivar read the March 13, 2002 x-ray as negative for large opacities, and Dr. Wiot read the November 5, 2002 x-ray as negative for large opacities. *See* 20 C.F.R. §718.304(a); Director's Exhibits 13, 14. Thus, the administrative law judge's finding that a preponderance of the x-ray evidence established the existence of complicated pneumoconiosis at 20 C.F.R. §718.304(a) is not supported by substantial evidence.

[6] At the hearing, employer designated Dr. Zaldivar's interpretation of the March 13, 2002 x-ray and Dr. Wiot's interpretation of the November 5, 2002 x-ray, both diagnosing simple pneumoconiosis but negative for complicated pneumoconiosis, as its two affirmative x-ray readings. Hearing Transcript at 8. Both readings were admitted into the record. *Id.* at 5; Director's Exhibits 13, 14. The record reflects that Dr. Zaldivar is a B reader, and that Dr. Wiot is a Board-certified radiologist and B reader. Director's Exhibits 13, 14.

Therefore, the administrative law judge's finding at 20 C.F.R. §718.304(a) is vacated, and the case is remanded to the administrative law judge to consider all of the new x-ray evidence to determine whether complicated pneumoconiosis is established. If the administrative law judge finds that the x-ray evidence establishes complicated pneumoconiosis, then he must weigh together all of the evidence relevant to the presence or absence of complicated pneumoconiosis pursuant to 20 C.F.R. §718.304. *Lester v. Director, OWCP*, 993 F.2d 1143, 17 BLR 2-114 (4th Cir. 1993); *Gollie v. Elkay Mining Co.*, 23 BLR 1-306 (2003).

In this regard, we reject employer's contention that it was error for the administrative law judge to decline to credit the two CT scan readings, which he found to be in equipoise, over the conventional x-rays with regard to the existence of complicated pneumoconiosis. *See Consolidation Coal Co. v. Director, OWCP* [*Stein*], 294 F.3d 885, 22 BLR 2-409 (7th Cir. 2002). Nevertheless, on remand the administrative law judge still must weigh together all of the relevant evidence after he has considered all of the x-ray readings, if he finds that they establish the existence of complicated pneumoconiosis. *See Lester*, 993 F.2d at 1145-46, 17 BLR at 2-117-18; *Melnick v. Consolidation Coal Co.*, 16 BLR 1-31, 1-33-34 (1991)(*en banc*).

In light of the decision to vacate the administrative law judge's findings pursuant to 20 C.F.R. §718.304, the administrative law judge's finding pursuant to 20 C.F.R. §725.309(d) is also vacated.

Accordingly, the administrative law judge's Decision and Order on Remand-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