BRB No. 07-0464 BLA

C.R.T.	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
ISLAND CREEK COAL COMPANY	)	DATE ISSUED: 02/21/2008
	)	
Employer-Respondent	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order – Denying Benefits of Daniel L. Leland, Administrative Law Judge, United States Department of Labor.

Leonard Stayton, Inez, Kentucky, for claimant.

Ashley M. Harman (Jackson Kelly PLLC), Morgantown, West Virginia, for employer.

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

PER CURIAM:

Claimant appeals the Decision and Order – Denying Benefits (2006-BLA-5201) of Administrative Law Judge Daniel L. Leland 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). The administrative law judge credited claimant with twenty-one years of qualifying coal mine employment as stipulated by the parties, and adjudicated this subsequent claim, filed on August 27, 2004, pursuant to the provisions at 20 C.F.R. Part 718. The administrative law judge found that, because the weight of the newly submitted evidence was insufficient to establish total disability

pursuant to 20 C.F.R. §§ 718.204, 718.304,[1] claimant failed to establish a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309. Accordingly, benefits were denied.

On appeal, claimant contends that the administrative law judge abused his discretion in denying claimant an opportunity, post-hearing, to obtain rereadings of three CT scan interpretations submitted by employer thirty-three days prior to the hearing. Claimant further challenges the administrative law judge's findings pursuant to 20 C.F.R. §718.304, arguing that the administrative law judge applied an incorrect legal standard and failed to explain his findings in accordance with the requirements of the Administrative Procedure Act (the APA), 5 U.S.C. §557(c), 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).[2] Employer responds in support of the administrative law judge's denial of benefits. The Director, Office of Workers' Compensation Programs, has declined to respond.

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.[3] 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).

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 (1989); *Trent v. Director, OWCP*, 11 BLR 1-26 (1987).

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[1] Claimant filed his first claim for benefits on February 5, 1987, and filed a second claim on October 19, 1999. Both claims were denied on the grounds that the evidence was insufficient to establish total disability. Director's Exhibits 1, 2.

[2] We affirm, as unchallenged on appeal, the administrative law judge's finding with regard to the length of claimant's coal mine employment and his finding that the evidence of record did not establish the existence of a totally disabling impairment pursuant to 20 C.F.R. §718.204(b)(2)(i)-(iv). *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

[3] The law of the United States Court of Appeals for the Fourth Circuit is applicable as the miner was employed in the coal mine industry in West Virginia. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989) (*en banc*).

We first address claimant's procedural arguments. At the formal hearing, claimant requested additional time to obtain CT scan readings in response to the three CT scan readings employer submitted thirty-three days before the hearing. Claimant explained that:

> [Although I received employer's rereadings 33 days before the hearing] my position is, under Shedlock, I wouldn't have been able to have got my readings in 20 days beforehand even if she had sent the CT scan with it, so my position is I should be entitled to additional time to have rereadings made of those CT scans.

Hearing Transcript at 16. The administrative law judge denied claimant's request, stating that *Shedlock v. Bethlehem Mines Corporation*, 9 BLR 1-196 (1986) allows a party to submit rebuttal evidence after the deadline imposed by the twenty-day rule only where a party is surprised by new evidence two or three days before the deadline. The administrative law judge, thus, concluded that because employer submitted the CT scan readings thirty-three days before the hearing, thirteen days before the deadline imposed by the twenty-day rule, *Shedlock* did not support his position. *Id*. On appeal, claimant argues that it was inappropriate for the administrative law judge to not allow him to submit rebuttal evidence, because a party is entitled to submit rebuttal evidence, and 20 C.F.R. §725.456 should be construed to favor the admission of all relevant evidence subject to the current evidentiary limitations. Claimant's Brief at 14. Claimant's arguments are without merit.

The applicable regulation specifies that documentary evidence may be received into evidence, if such evidence is sent to all other parties at least twenty days before a hearing is held in connection with the claim. *See* 20 C.F.R. §725.456. Moreover, the due process rights of confrontation and cross-examination, as they are incorporated into 20 C.F.R. §725.455(c), require only that the parties be allowed a reasonable opportunity to know the claims of the opposing party and to meet them. *See North American Coal Co. v. Miller*, 870 F.2d 948, 12 BLR 2-222 (3d Cir. 1989). The record reflects that employer submitted its evidence thirty-three days prior to the hearing, more than the twenty days required under 20 C.F.R. §725.456(b)(2); claimant took no action prior to the hearing; and the administrative law judge found the amount of time sufficient to bar claimant from alleging that he was unfairly surprised by employer's evidence. Accordingly, we reject claimant's arguments that the administrative law judge abused his discretion in denying him an opportunity, post-hearing, to develop and submit rebuttal evidence. *See Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*).

Turning to the appeal on the merits of the claim, we next address claimant's challenge to the administrative law judge's finding that the probative value of the CT

scan evidence outweighed the x-ray evidence pursuant to Section 718.304. Claimant argues that the administrative law judge applied an incorrect legal standard in analyzing the x-ray and CT scan evidence of record, and failed to state a basis for his finding that a CT scan is a better diagnostic tool. Claimant's Brief at 12-13. Claimant's arguments have merit.

Section 411(c)(3) of the Act, as implemented by Section 718.304, 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 which would yield results equivalent to (A) or (B). 30 U.S.C. §921(c)(3); 20 C.F.R. §718.304.[4]

The introduction of legally sufficient evidence of complicated pneumoconiosis does not automatically qualify a claimant for the irrebuttable presumption found at Section 718.304. The administrative law judge must examine all the evidence on this issue, *i.e.*, evidence of simple and complicated pneumoconiosis, as well as evidence of no

[4] Section 718.304 provides in relevant part:

> There is an irrebuttable presumption that a miner is totally disabled due to pneumoconiosis . . . if such miner is suffering . . . from a chronic dust disease of the lung which:
>
> When diagnosed by chest X-ray . . . yields one or more large opacities (greater than 1 centimeter in diameter) and would be classified in Category A, B, or C . . .; or
>
> When diagnosed by biopsy or autopsy, yields massive lesions in the lung; or
>
> When diagnosed by means other than those specified in paragraphs (a) and (b) of this section, would be a condition which could reasonably be expected to yield the results described in paragraph (a) or (b) of this section had diagnosis been made as therein described: *Provided, however,* That any diagnosis made under this paragraph shall accord with acceptable medical procedures.

20 C.F.R. §718.304.

pneumoconiosis, resolve any conflict, and make a finding of fact. *Melnick v. Consolidation Coal Co.*, 16 BLR 1-31 (1991)(*en banc*); *Truitt v. North Am. Coal Corp.*, 2 BLR 1-199 (1979), *aff'd sub nom. Director, OWCP v. North Am. Coal Corp.*, 626 F.2d 1137, 2 BLR 2-45 (3d Cir. 1980).

In *Eastern Associated Coal Corp. v. Director, OWCP* [*Scarbro*], 220 F.3d 250, 22 BLR 2-93 (4th Cir. 2000), the United States Court of Appeals for the Fourth Circuit, within whose jurisdiction this case arises, held that a single piece of relevant evidence could support an administrative law judge's finding that the irrebuttable presumption was successfully invoked "if that piece of evidence outweighs conflicting evidence in the record." *Scarbro*, 220 F.3d at 256, 22 BLR at 2-101. The Fourth Circuit further explained:

> Thus, even where some x-ray evidence indicates opacities that would satisfy the requirements of prong (A), if other x-ray evidence is available or if evidence is available that is relevant to an analysis under prong (B) or prong (C), then all of the evidence must be considered and evaluated to determine whether the evidence as a whole indicates a condition of such severity that it would produce opacities greater than one centimeter in diameter on an x-ray. [Citation omitted]. Of course, if the x-ray evidence vividly displays opacities exceeding one centimeter, its probative force is not reduced because the evidence under some other prong is inconclusive or less vivid. Instead, the x-ray evidence can lose force only if other evidence affirmatively shows that the opacities are not there or are not what they seem to be, perhaps because of an intervening pathology, some technical problem with the equipment used, or incompetence of the reader.

Scarbro, 220 F.3d at 256, 22 BLR at 2-101.

In weighing the evidence relevant to Section 718.304, the administrative law judge first considered the interpretations of the two newly submitted x-rays of record. He properly noted that all the physicians who read the February 14, 2005, x-ray were equally qualified and that Drs. Miller and Alexander interpreted the x-ray as showing complicated pneumoconiosis, Category A, while Drs. Scott and Scatarige interpreted the x-ray as negative for pneumoconiosis. Decision and Order at 6; Claimant's Exhibits 1, 2; Employer's Exhibit 4. The administrative law judge then concluded that because the four opinions were in equipoise, the x-ray did not support a finding of complicated pneumoconiosis. Decision and Order at 6. The administrative law judge further properly noted that Dr. Ranvaya, a B reader, and Dr. Alexander, a Board-certified radiologist and B reader, interpreted the April 13, 2005, x-ray as showing complicated pneumoconiosis,

while Dr. Wheeler, a Board-certified radiologist and B reader, interpreted the x-ray as negative for pneumoconiosis. The administrative law judge then concluded that "the preponderance of the April 13, 2005, x-ray readings support a finding that the miner has complicated pneumoconiosis." Decision and Order at 6; Director's Exhibits 13, 16; Claimant's Exhibit 3.

The administrative law judge went on to assess the probative value of the CT scan and medical opinion evidence, concluding that the negative CT scan interpretations and the medical opinions finding no complicated pneumoconiosis were entitled to probative weight, but failing to explain how this evidence diminished the probative value of the x-ray evidence in accordance with *Scarbro*. In assigning probative value to the contrary CT scan interpretations, the administrative law judge stated only that, "[a]s CT scans are more sophisticated diagnostic methods than chest x-rays, I give more weight to the negative CT scan interpretations than the one positive chest x-ray."[5] Decision and Order at 6. In crediting the medical opinions of Drs. Crisalli and Castle the administrative law judge stated that the opinions were reasoned, but failed to offer any explanation as to how this evidence diminished the probative value of the contrary x-ray evidence.[6] *Id*. The administrative law judge's failure to explain the basis of his findings is error, as the APA expressly mandates that every adjudicatory decision be accompanied by a statement of findings of fact and conclusions of law and the basis therefor on all material issues of fact, law or discretion presented in the record. 5 U.S.C. §§554(c), 556(d), 557(c); *see Robertson v. Alabama By-Products Corp.*, 7 BLR 1-793, 1-795 (1985).

[5] Although the administrative law judge did not reference the deposition testimonies of Drs. Castle and Crisalli, a review of the record indicates that Dr. Castle explained that a CT scan is a "more sensitive imaging device," Employer's Exhibit 6 at 14; and Dr. Crisalli stated that a CT scan better defines changes in the lung than would a routine x-ray, Employer's Exhibit 7 at 23. It is unclear, however, without the administrative law judge saying more, how these qualities diminish the probative value of an x-ray that, similar to the CT scans of record, detected lesions greater than one centimeter in diameter.

[6] The Board additionally notes that the administrative law judge failed to consider the physicians' x-ray comments. The administrative law judge credited Dr. Miller's reading of the February 14, 2005, x-ray and Dr. Alexander's reading of the March 13, 2005, x-ray as consistent with statutory complicated pneumoconiosis, but the comments on their reports also state that the opacities seen on x-ray could be cancer. Claimant's Exhibits 2, 3. As this evidence is relevant to the etiology of the lesions seen on x-ray and the probative value of the x-ray evidence as a whole, it was error that the administrative law judge failed to consider it in conjunction with the CT scan and medical opinion evidence.

As the administrative law judge failed to explain, consistent with the mandates of the APA and the legal standard set forth in Scarbro, whether the CT scan and medical opinion evidence persuasively established that the opacities seen on x-ray do not exist or that they are the result of a disease process unrelated to claimant's exposure to coal mine dust, we vacate his findings pursuant to Section 718.304, and remand the case for further consideration. On remand, the administrative law judge is directed to first determine whether the relevant evidence in each category under 20 C.F.R. §718.304(a)-(c) tends to establish whether claimant has a chronic lung disease that manifests itself with opacities greater than one centimeter, then to weigh the evidence together and specifically explain the basis for the weight assigned to any conflicting evidence. *See Collins v. J&L Steel*, 21 BLR 1-181 (1999); *Scarbro*, 220 F.3d at 256, 22 BLR at 2-101; *Lester*, 993 F.2d at 1145, 17 BLR at 2-117; *Melnick*, 16 BLR at 1-33.

Accordingly, the administrative law judge's Decision and Order – Denying Benefits is affirmed in part and vacated in part, and this 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