BRB No. 09-0668 BLA

MARCKO D. PRITT	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
CANNELTON INDUSTRIES, INCORPORATED	)	DATE ISSUED: 06/23/2010
	)	
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 Richard A. Morgan, Administrative Law Judge, United States Department of Labor.

Leonard Stayton, Inez, Kentucky, for claimant.

Carl M. Brashear (Hoskins Law Offices, PLLC), Lexington, Kentucky, for employer.

Paul L. Edenfield (M. Patricia Smith, Solicitor of Labor; Rae Ellen James, Associate Solicitor; Michael J. Rutledge, Counsel for Administrative Litigation and Legal Advice), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

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

PER CURIAM:

Claimant appeals the Decision and Order Denying Benefits (2007-BLA-5803) of Administrative Law Judge Richard A. Morgan with respect to a claim filed on July 28, 2005, 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). The administrative law judge found the instant case to be a request for modification of the prior denial of benefits. Adjudicating the claim under 20 C.F.R. Part 718, the administrative law judge credited claimant with thirty-three years of coal mine employment, based on a stipulation of the parties. Initially, the administrative law judge found that the x-ray evidence of record was insufficient to establish complicated pneumoconiosis pursuant to 20 C.F.R. §718.304(a) and was, therefore, insufficient to establish entitlement to the irrebuttable presumption of totally disabling pneumoconiosis at Section 411(c)(3) of the Act, 30 U.S.C. §921(c)(3). The administrative law judge then found, on considering all of the medical evidence of record, that, while it was sufficient to establish the existence of clinical and legal simple pneumoconiosis pursuant to 20 C.F.R. §718.202(a), it was insufficient to establish a totally disabling respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(b). Accordingly, the administrative law judge found that a mistake in a determination of fact was not established at 20 C.F.R. §725.310 and denied benefits.[1]

On appeal, claimant initially raises an evidentiary matter concerning the administrative law judge's admission into the record of both of employer's readings of the August 16, 2005 x-ray film as rebuttal evidence. Claimant argues that employer is not entitled to submit both of these readings as rebuttal evidence under 20 C.F.R. §725.414. With respect to the merits of the claim, claimant contends that the administrative law judge erred in weighing the relevant x-ray evidence on the issue of complicated pneumoconiosis under Section 718.304(a), because he did not first address "whether each separate x-ray [was] positive, negative, or in equipoise," on the issue of complicated pneumoconiosis, before considering the totality of the x-ray evidence on the issue. Claimant's Brief at 12. Claimant also contends that the administrative law judge erred in failing to consider whether other evidence established complicated pneumoconiosis pursuant to Section 718.304(c). In response, employer urges affirmance of the administrative law judge's denial of benefits, as supported by substantial evidence. In addition, employer contends that the administrative law judge properly admitted both of its readings of the August 16, 2005 x-ray. The Director, Office of Workers' Compensation Programs (the Director), responds, agreeing with claimant that the administrative law judge erred in finding that the x-ray evidence did not establish complicated pneumoconiosis on the basis that a greater number of readers read the x-rays as negative for complicated pneumoconiosis. Instead, the Director contends that the administrative law judge "should have separately analyzed each x-ray and the interpretations thereof to determine whether and how strongly each individual x-ray

[1] The administrative law judge also found that a change in conditions was not established at 20 C.F.R. §725.310, because the existence of pneumoconiosis had already been established and claimant merely submitted additional positive interpretations of x-rays previously considered. Decision and Order at 10.

supported a finding of complicated pneumoconiosis." Director's Brief at 5. The Director argues, therefore, that the case should be remanded for the administrative law judge to reconsider the x-ray evidence on the issue of complicated pneumoconiosis pursuant to Section 718.304(a).[2]

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).

In order to establish entitlement to benefits in a living miner's claim pursuant to 20 C.F.R. Part 718, claimant must prove that he suffers from pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, and that the pneumoconiosis is totally disabling. *See* 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure to establish any one of these elements precludes entitlement. *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(*en banc*). In reviewing the record as a whole on modification, an administrative law judge is authorized "to correct mistakes of fact, whether demonstrated by wholly new evidence, cumulative evidence, or merely further reflection on the evidence initially submitted." *O'Keefe v. Aerojet-General Shipyards, Inc.*, 404 U.S. 254, 257 (1971).

On March 23, 2010, amendments to the Act, affecting claims filed after January 1, 2005, that were pending on or after March 23, 2010, were enacted. The amendments, *inter alia*, revive Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4), which provides a presumption of totally disabling pneumoconiosis in cases where the miner has established fifteen or more years of coal mine employment and a totally disabling respiratory impairment. 30 U.S.C. §921(c)(4).[4] By Order issued on April 7, 2010, the Board

[2] We affirm the administrative law judge's findings of thirty-three years of coal mine employment, that the evidence established clinical and legal simple pneumoconiosis pursuant to 20 C.F.R. §718.202(a), and that the evidence failed to establish total respiratory disability pursuant to 20 C.F.R. §718.204(b), as these findings are unchallenged on appeal. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

[3] As claimant's coal mine employment was in West Virginia, 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.

[4] In addition, under Section 422(*l*) of the Act, as amended, 30 U.S.C. §932(l), a qualified survivor of a miner, who filed a successful claim for benefits, is automatically entitled to survivor's benefits without the burden of establishing entitlement.

provided the parties with the opportunity to address the impact, if any, of the 2010 amendments in this case.

In response to the Order, claimant states that the 2010 amendments apply in this case because a finding of complicated pneumoconiosis would establish total respiratory disability, and thereby entitle claimant to invocation of the Section 411(c)(4) presumption of disabling pneumoconiosis. *See* Claimant's Supplemental Brief at 2. Employer responds that claimant is not entitled to invocation of the Section 411(c)(4) presumption because claimant does not challenge the administrative law judge's finding that the evidence failed to establish total respiratory disability at Section 718.204(b). Employer contends, therefore, that, because an element necessary to invocation of the Section 411(c)(4) presumption has not been established, *i.e.*, total respiratory disability, the 2010 amendments are not applicable in this case. Employer's Brief at 2. The Director contends that the 2010 amendments, which, *inter alia*, revive the Section 411(c)(4) presumption of totally disabling pneumoconiosis, do not affect this case because the administrative law judge found that total respiratory disability was not established at Section 718.204(b) and this finding was not challenged by claimant on appeal. Director's Brief at 3.

Based on the parties' responses, and our review, we hold that this case is not affected by the recent amendments to the Act. In this case, claimant filed his claim after January 1, 2005, and was credited with thirty-three years of coal mine employment. However, the administrative law judge found that claimant failed to establish a totally disabling respiratory or pulmonary impairment pursuant to Section 718.204(b). Decision and Order at 16. Claimant does not challenge this finding. Consequently, claimant has not established all of the elements necessary to invoke the Section 411(c)(4) presumption and the presumption is not applicable in this case. *See* 30 U.S.C. §921(c)(4). We turn, therefore, to the issues raised by the parties on appeal.

Initially, we address claimant's evidentiary challenge. Claimant contends that the administrative law judge erred in admitting the x-ray reading of Dr. Poulos, of the August 16, 2005 x-ray, which was submitted by employer. Claimant argues that the administrative law judge erred in allowing employer to submit Dr. Poulos's reading as rebuttal of Dr. Alexander's reading of the August 16, 2005 x-ray, because Dr. Alexander's reading was submitted by claimant to rebut the x-ray reading admitted as part of the Department of Labor (DOL) pulmonary evaluation of claimant. Because Dr. Alexander's reading was submitted as rebuttal evidence, claimant contends that Dr. Poulos's reading cannot be submitted to rebut it. In response, employer argues that, because claimant did not designate Dr. Alexander's reading of the August 16, 2005 film as rebuttal evidence, it should be assumed to be part of claimant's affirmative case evidence, which employer is entitled to rebut.

In this case, as part of the DOL-sponsored pulmonary evaluation, the Director submitted an August 16, 2005 x-ray, read by Dr. Rasmussen. Director's Exhibit 13. Employer then submitted a reading of that x-ray, by Dr. Repsher, as its rebuttal x-ray reading, and claimant submitted Dr. Alexander's reading of that x-ray as its rebuttal evidence. Employer's Exhibit 4; Claimant's Exhibit 1. Employer also submitted a second reading of the August 16, 2005 x-ray, by Dr. Poulos, as rebuttal of Dr. Alexander's reading. Employer's Exhibit 5. The administrative law judge admitted the readings of both Drs. Repsher and Poulos, as employer's rebuttal evidence, stating:

> Dr. Repsher's reading is rebuttal to the DOL X-ray reading and Dr. Poulos' reading [is] rebuttal to the Claimant's reading. The fact that the Claimant submitted its two readings as "rebuttal" does not prohibit the Employer from rebutting Claimant's readings.

Decision and Order at 5, n.11. Consequently, the administrative law judge denied claimant's evidentiary challenge to the number of rebuttal readings of the August 16, 2005 x-ray submitted by employer. Decision and Order at 5.

The regulations allow claimant and employer to each submit an x-ray reading to rebut the x-ray reading submitted by the opposing party as part of the opposing party's affirmative case evidence, as well as a reading to rebut an x-ray reading submitted by the Director pursuant to 20 C.F.R. §725.406. *See* 20 C.F.R. §725.414(a)(2)(ii), (a)(3)(ii). Contrary to the administrative law judge's interpretation of the regulation, Section 725.414 does not allow a party to submit an x-ray reading to rebut an x-ray reading that has been submitted as rebuttal evidence by an opposing party. 20 C.F.R. §725.414(a)(2)(ii), (3)(ii). Further, we disagree with employer that Dr. Alexander's x-ray reading should be considered a part of claimant's affirmative case evidence because claimant did not designate it as rebuttal evidence. The record contains claimant's Black Lung Benefits Act Evidence Summary Form, dated December 18, 2008, in which claimant specifically designated Dr. Alexander's reading as rebuttal evidence to the DOL-sponsored evidence. Consequently, we vacate the administrative law judge's admission of both Dr. Repsher's and Dr. Poulos's readings of the August 16, 2005 x-ray into the record as rebuttal evidence, and remand the case for the administrative law judge to properly apply the evidentiary limitations pursuant to Section 725.414. *See Smith v. Martin County Coal Corp.*, 23 BLR 1-69 (2004). On remand, because employer would be entitled to submit Dr. Poulos's reading as part of its affirmative case evidence, the administrative law judge must determine whether it is admissible under Section 725.414(a)(3)(i). If the administrative law judge admits Dr. Poulos's reading, as part of employer's affirmative case evidence under Section 725.414(a)(3)(i), then claimant must be allowed to submit an additional x-ray interpretation to rebut Dr. Poulos's interpretation pursuant to Section 725.414(a)(2)(ii).

In light of our decision to remand the case to the administrative law judge for further consideration of the admissibility of the x-ray evidence pursuant to Section 725.414, we vacate his finding that the weight of the x-ray evidence is insufficient to establish the existence of complicated pneumoconiosis pursuant to Section 718.304(a). However, in the interest of judicial efficiency, and to avoid repetition of error on remand, we will address claimant's arguments concerning the administrative law judge's weighing of the evidence pursuant to Section 718.304(a).

In challenging the administrative law judge's weighing of the evidence at Section 718.304(a), claimant, citing *Adkins v. Director, OWCP*, 958 F.2d 49, 16 BLR 2-61 (4th Cir. 1992), contends that the administrative law judge should have first addressed whether each individual x-ray was either positive or negative for complicated pneumoconiosis, before weighing the x-ray evidence as a whole. Claimant's Brief at 12-13. Claimant further contends that the administrative law judge erred in not considering the fact that Dr. Alexander, a dually qualified reader, read two separate x-rays as positive for complicated pneumoconiosis, while Dr. Poulos, a dually qualified reader, read only one x-ray as negative for complicated pneumoconiosis. Claimant contends that the administrative law judge's reliance on the number of physicians who read x-rays as negative for complicated pneumoconiosis was inappropriate and constituted an impermissible "counting of heads" to evaluate the evidence. *Id*. The Director agrees with claimant, stating that the case should be remanded to the administrative law judge to weigh the x-rays individually, on the existence of complicated pneumoconiosis, before weighing the x-ray evidence as a whole. Specifically, the Director contends that the case law of the Board and the United States Court of Appeals for the Fourth Circuit, within whose jurisdiction this case arises, requires this type of weighing. Director's Brief at 7-9. Employer argues, however, that the administrative law judge properly weighed all of the x-ray evidence together and that the Fourth Circuit's holding in *Adkins* is applicable only at Section 718.202(a)(1). Employer's Brief at 6.

The record contains six readings of two x-ray films, dated August 16, 2005 and December 13, 2006. With regard to the August 16, 2005 x-ray, Dr. Alexander, a B reader and Board-certified radiologist, noted Category A large opacities. Claimant's Exhibit 1. Dr. Rasmussen, a B reader, noted that the findings were "most likely" complicated pneumoconiosis, but did not rule out granuloma. Director's Exhibit 13. Dr. Poulos, a B reader and Board-certified radiologist, did not find any large opacities, but noted "coalescing in both upper lungs." Employer's Exhibit 5. Dr. Repsher, a B reader, did not find large opacities, but found 2/2 q/r and marked box "ax," stating that it was a "markedly atypical x-ray for CWP." Employer's Exhibit 4. The December 13, 2006 x-ray was read by Dr. Zaldivar, a B-reader, as showing 3/2, q/r opacities, but Dr. Zaldivar did not comment on the issue of large opacities. Director's Exhibit 34; Employer's Exhibit 1. Dr. Alexander interpreted the film as showing Category A, large opacities. Claimant's Exhibit 2.

In weighing the x-ray evidence pursuant to Section 718.304(a), the administrative law judge stated that five physicians who are "either" B readers and/or Board-certified radiologists read the two x-ray films of record, and that only two of the five readers read x-rays as positive for complicated pneumoconiosis. Decision and Order at 12. Further, noting that the two dually-qualified radiologists, Dr. Alexander and Dr. Poulos, were split in their reading of the x-ray evidence, the administrative law judge concluded that "the evidence concerning complicated pneumoconiosis [was], at best, in equipoise." Decision and Order at 13. Consequently, the administrative law judge found that claimant did not establish the existence of complicated pneumoconiosis at Section 718.304(a).

The Fourth Circuit court has expressed its disapproval of "counting heads" to resolve conflicting evidence. *Adkins*, 958 F.2d at 52, 16 BLR at 2-66 (stating that "counting heads" is a "hollow" way to resolve conflicts in the evidence); *see Wilt v. Wolverine Mining Co*., 14 BLR 1-70 (1990). Thus, as the administrative law judge relied on the greater number of readers who read x-rays as negative for complicated pneumoconiosis, to find that the x-ray evidence did not establish complicated pneumoconiosis, he has not provided a sufficient evaluation of the relevant x-ray evidence of record. *Adkins*, 958 F.2d at 52, 16 BLR at 2-66. Further, the administrative law judge did not discuss the fact that Dr. Alexander, a dually-qualified reader, read two separate x-rays as showing complicated pneumoconiosis, while Dr. Poulos read only one x-ray, and read it as negative for pneumoconiosis. Decision and Order at 12; Claimant's Exhibits 1, 2. Consequently, on remand, once the administrative law judge determines the admissibility of the x-ray evidence, he must then provide a more detailed discussion of the relevant x-ray evidence at Section 718.304(a). *See Adkins*, 958 F.2d at 52, 16 BLR at 2-66; *Melnick v. Consolidation Coal Co*., 16 BLR 1-31 (1991)(*en banc*); *Wilt*, 14 BLR at 1-76; *see also* The Administrative Procedure Act, 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); *Wojtowicz v. Duquesne Light Co*., 12 BLR 1-162, 1-165 (1989). Moreover, on remand, the administrative law judge must also consider whether there is evidence relevant to the issue of complicated pneumoconiosis at Section 718.304(c). If, the administrative law judge finds complicated pneumoconiosis established under either Section 718.304(a) or (c),[5] he must then weigh the evidence at each subsection together to determine whether claimant has established complicated pneumoconiosis and is, therefore, entitled to invocation of the irrebuttable presumption of total disability due to

[5] There is no evidence in the record relevant to the issue of complicated pneumoconiosis at 20 C.F.R. §718.304(b).

pneumoconiosis pursuant to Section 718.304.[6] *See Lester v. Director, OWCP*, 993 F.2d 1143, 17 BLR 2-114 (4th Cir. 1993); *Melnick*, 16 BLR at 1-34.

Accordingly, the administrative law judge's Decision and Order Denying 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.

_____
NANCY S. DOLDER, Chief
Administrative Appeals Judge

_____
REGINA C. McGRANERY
Administrative Appeals Judge

_____
BETTY JEAN HALL
Administrative Appeals Judge

[6] If the administrative law judge finds that the evidence does not establish complicated pneumoconiosis and, therefore, that claimant is not entitled to the presumption at 20 C.F.R. §718.304, 30 U.S.C. §921(c)(3), then entitlement under the Act is precluded in this case.