BRB No. 05-0818 BLA

JAMES McCOY, JUNIOR	)	
	)	
Claimant	)	
	)	
v.	)	
	)	
HOLLY BETH COAL COMPANY, INCORPORATED	)	DATE ISSUED: 05/25/2006
	)	
and	)	
	)	
ROCKWOOD INSURANCE COMPANY	)	
	)	
Employer/Carrier-Petitioner	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order-Award of Benefits of Richard T. Stansell-Gamm, Administrative Law Judge, United States Department of Labor.

Timothy W. Gresham (Penn, Stuart & Eskridge), Abingdon, Virginia, for employer.

Jeffrey S. Goldberg (Howard M. Radzely, Solicitor of Labor; Allen H. Feldman, 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: SMITH, McGRANERY, and HALL, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order-Award of Benefits (04-BLA-5277) of Administrative Law Judge Richard T. Stansell-Gamm (the administrative law judge) rendered on a 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] The administrative law judge found that claimant established a coal mine employment history of twenty-eight and three-quarter years and that the instant claim constituted a subsequent claim pursuant to 20 C.F.R. §725.309. Decision and Order at 6-8. The administrative law judge further found that the newly submitted evidence, *i.e.*, that evidence submitted subsequent to the previous denial of benefits, established the existence of complicated pneumoconiosis and therefore established that claimant was entitled to the irrebuttable presumption of total disability due to pneumoconiosis provided at Section 411(c)(3) of the Act, 30 U.S.C. §921(c)(3), as implemented by 20 C.F.R. §718.304. Decision and Order at 9-30. Thus, the administrative law concluded that claimant established a change in an applicable condition of entitlement by establishing the presence of a totally disabling respiratory impairment, the element of entitlement upon which the previous denial was based. *Id.* In considering the merits of entitlement, the administrative law judge found that claimant established the presence of complicated pneumoconiosis, 20 C.F.R. §718.202(a)(3), that he was entitled to the presumption that his pneumoconiosis arose out of coal mine employment, 20 C.F.R. §718.203(b), and that, because the existence of complicated pneumoconiosis was established, claimant was entitled to the presumption that his pneumoconiosis was totally disabling, 20 C.F.R. §718.304. Decision and Order at 30-31. Benefits were awarded as of April 1, 2002, the month in which claimant filed his subsequent claim for benefits, and employer was found liable for such benefits.

On appeal, employer contends that the administrative law judge erred in finding the existence of complicated pneumoconiosis established by the newly submitted x-ray evidence and in finding employer to be the responsible operator liable for benefits. Employer further asserts that if claimant is found to suffer from complicated pneumoconiosis, it is not liable as the responsible operator because the disease was first

[1] The procedural history of claimant's prior claims is set forth in the Board's decision, *McCoy v. Holly Beth Coal Company*, BRB No. 98-1524 BLA (May 17, 2000) (unpub). Subsequent to the Board's decision, Administrative Law Judge Richard A. Morgan found that the x-ray evidence of record did not support a finding of complicated pneumoconiosis and denied benefits. Claimant sought modification of that denial, but the district director denied claimant's request for modification. On April 22, 2002, claimant filed the instant subsequent claim. Director's Exhibit 3. After a hearing, Administrative Law Judge Richard T. Stansell-Gamm issued the Decision and Order awarding benefits from which employer now appeals.

manifested in 1971, before it employed claimant. Claimant has not responded to employer's appeal. The Director, Office of Workers' Compensation Programs, (the Director) takes no position on whether the administrative law judge's finding of complicated pneumoconiosis was correct, but argues that if the Board affirms the finding of complicated pneumoconiosis, it must also affirm the designation of employer as responsible operator since the previous denial of the earlier claim demonstrates, as a matter of law, that claimant did not suffer from complicated pneumoconiosis at that time.[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. 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).

Employer asserts that the administrative law judge erred in finding that five of the six newly submitted x-rays established the existence of complicated pneumoconiosis because readings of three x-rays the administrative law judge relied upon were evenly split and because several readings specifically stated that no abnormalities consistent with pneumoconiosis were found, yet the administrative law judge credited the readings as supporting a finding of complicated pneumoconiosis. Employer also asserts that the administrative law judge erred in finding that Category A, B, and C refer only to the size of an opacity and in attributing an ILO classification to x-ray readings where the physicians had not classified the abnormality. Rather, employer asserts that the large opacity seen on x-ray must be affirmatively classified in Category A, B, or C, by the reader/physician. Thus, employer contends that under Section 718.304(a), the administrative law judge must determine not only whether there is a large opacity greater than one centimeter, but also whether that opacity is the result of pneumoconiosis or a chronic dust disease of the lungs. Employer's Brief at 11; *Director, OWCP v. Eastern Coal Corp.* [*Scarbro*], 220 F.3d 250, 22 BLR 2-93 (4th Cir. 2000); *Lester v. Director, OWCP*, 993 F.2d 1143, 17 BLR 2-114 (4th Cir. 1993); *Melnick v. Consolidation Coal Co.*, 16 BLR 1-31 (1991).

In finding the presence of complicated pneumoconiosis established, the administrative law judge determined that the June 28, 2002 x-ray was positive for complicated pneumoconiosis based on Dr. Forehand's finding of a Category B opacity

[2] Because employer has not challenged the administrative law judge's length of coal mine employment determination or the finding that claimant's pneumoconiosis arose out of coal mine employment, 20 C.F.R. §718.203(b), those findings are affirmed. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

which he believed to be complicated pneumoconiosis, and Dr Hippensteel's finding of a 1.5 nodule, even though Dr. Hippensteel rejected a diagnosis of complicated pneumoconiosis. Director's Exhibits 15, 37. The administrative law judge also found that the September 12, 2002 x-ray was positive for complicated pneumoconiosis based on Dr. Alexander's observation of a Category A large opacity and Dr. Wheeler's observation of scattered masses as large as two centimeters. Claimant's Exhibit 3; Director's Exhibit 37. Likewise, the administrative law judge found that the May 12, 2004 x-ray was positive for complicated pneumoconiosis based on Dr. Scatarige's observation of 1.5 centimeter mass in claimant's lungs, despite Dr. Scatarige's statement that the x-ray was negative for pneumoconiosis. Employer's Exhibit 1. The administrative law judge also found that the October 22, 2003 x-ray was positive for complicated pneumoconiosis as Dr. Pathak observed Category B large opacities consistent with complicated pneumoconiosis, Claimant's Exhibit 1; Dr. Robinette observed Category A large opacities consistent with complicated pneumoconiosis; Dr. Scatarige observed a 1.5 centimeter nodule in the upper left lobe and multiple bilateral nodules ranging up to two centimeters and stated that there was no pneumoconiosis, Employer's Exhibit 2, while Dr. Renn saw small opacities but no large opacities, Employer's Exhibit 6. Likewise, the administrative law judge found that the most recent x-ray of June 2, 2004 was positive for complicated pneumoconiosis because Dr. Hippensteel noted a two centimeter nodule in the right lower lobe and a one centimeter nodule in the upper left lobe. Employer's Exhibit 10. The administrative law judge, concluded, therefore, that a preponderance of the newly submitted x-ray evidence established the presence of a pulmonary opacity greater than one centimeter and that claimant had, therefore, established the presence of complicated pneumoconiosis by means of x-ray evidence at Section 718.304(a). Considering whether other evidence affirmatively showed that the large opacities seen on x-ray were caused by some pathology other than coal workers' pneumoconiosis, the administrative law judge found it did not. *See Scarbro*, 220 F.3d 250, 22 BLR 2-93.

The regulations plainly state that an x-ray reading must specifically diagnose "one or more large opacities (greater than 1 centimeter in diameter)…[which] would be classified in Category A, B, or C" in the ILO/U-C International Classification of x-rays to establish the existence of complicated pneumoconiosis. 20 C.F.R §718.304(a)(1); *Scarbro*, 220 F.3d 250, 22 BLR 2-93. The administrative law judge did not recognize that "opacity" is a term of art used to classify pneumoconiosis, but instead, believed that the categories A, B and C refer only to the size of any finding. Decision and Order at 12 n 16.[3] As a result he credited the 1.5 centimeter "nodule" found by Dr. Hippensteel,

[3] Abnormalities in the lung which appear to be consistent with pneumoconiosis are classified as either small or large opacities. *Guidelines for the Use of ILO International Classification of Radiographs of Pneumoconioses* (Rev. ed. 1986) at 3, 4, 6. If it is probable that all of the abnormalities seen on x-ray are not pneumoconiosis, the doctor is directed not to classify them but to describe them using appropriate symbols and

Director's Exhibit 37, the 1.5 centimeter "mass" diagnosed by Dr. Scatarige, Employer's Exhibit 1, the 1.5 centimeter "nodule" and 2 centimeter "nodule" diagnosed by Dr. Scatarige, Employer's Exhibit 2, the 2 centimeter "nodule" diagnosed by Dr. Hippensteel, Employer's Exhibit 10, and the "scattered masses…reaching 2 centimeters" diagnosed by Dr. Wheeler, Director's Exhibit 37, as complicated pneumoconiosis pursuant to Section 718.304(a). Because these doctors did not diagnose the presence of a "large opacity" as defined at Section 718.304, the administrative law judge erred in finding that their interpretations established the existence of complicated pneumoconiosis. *See* 20 C.F.R. §718.304(a); *Tackett v. Director, OWCP*, 7 BLR 1-703 (1985); *Arnold v. Consolidation Coal Co.*, 7 BLR 1-648 (1985). Accordingly, we vacate the administrative law judge's finding that the newly submitted x-ray evidence establishes the existence of complicated pneumoconiosis based on the administrative law judge's evaluation of the newly submitted x-ray evidence and we remand the claim for further consideration of that evidence. *Scarbro*, 220 F.3d at 255, 22 BLR at 2-100; *Double B Mining, Inc. v. Blankenship*, 177 F.3d 240, 243, 22 BLR 2-554, 2-561 (4th Cir. 1999); *see Director, OWCP v. Greenwich Collieries [Ondecko]*, 512 U.S. 267, 18 BLR 2A-1 (1994), *aff'g Greenwich Collieries v. Director, OWCP*, 990 F.2d 730, 17 BLR 2-64 (3d Cir. 1993). We further direct the administrative law judge to weigh the other newly submitted evidence relevant to the issue of complicated pneumoconiosis in order to determine whether that evidence supports a finding of complicated pneumoconiosis. 20 C.F.R. §718.304(a)-(c); *see Scarbro*, 220 F.3d 250, 22 BLR 2-93; *Lester*, 993 F.2d 1143, 17 BLR 2-114; *Melnick*, 16 BLR 1-31.[4]

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comments. Hence, unless the doctor is using the term opacity or states that the x-ray demonstrates pneumoconiosis, he is not diagnosing pneumoconiosis.

[4] After considering the other relevant evidence, *i.e*, CT scan interpretations, biopsy results or physicians' opinions, the administrative law judge concluded that it was insufficient to show that the large opacities seen on x-ray were due to another pathology. Specifically, the administrative law judge noted that no physician questioned the accuracy of the x-ray evidence showing large opacities greater than one centimeter. Decision and Order at 10. Rather, the administrative law judge noted that the physicians focused on the cause of the opacities, *i.e.*, Drs. Wheeler, Renn, Scatarige, McSharry, and Hippensteel attributed them to causes other than complicated pneumoconiosis while Drs. Alexander, Robinette, and Forehand attributed them to complicated pneumoconiosis. The administrative law judge found that the opinions of Drs. Wheeler, Renn, Alexander, and Scatarige were less documented than the opinions of the other doctors who considered other objective medical evidence, in addition to x-rays. Accordingly, because he found the opinions of Drs. Wheeler, Renn, Alexander, and Scaterige to be not as well documented or reasoned, the administrative law judge accorded their opinions, attributing the large opacities seen on x-ray to other causes, diminished weight. The administrative law judge noted that the opinion of Dr. Robinette, who was claimant's long-term treating

If, on remand, the administrative law judge determines that the new evidence establishes a change in an applicable condition of entitlement, he must then turn to the merits of the claim and determine whether entitlement is established based on a review of all of the evidence of record. Because we are vacating the administrative law judge's finding of complicated pneumoconiosis, and remanding the case for further consideration of complicated pneumoconiosis and entitlement, we must also vacate his determination of the date for commencement of benefits. If the administrative law judge again awards benefits, he should determine the onset date based upon the credited evidence of record.

Lastly, employer argues that if the existence of complicated pneumoconiosis were established, employer should not be held liable as the responsible operator as x-ray evidence first indicated the presence of complicated pneumoconiosis in March, 1971, and claimant did not begin working for employer until 1983, some twelve years later. Employer contends that the large mass in claimant's lung had been seen on x-ray since "1971 or 1972" and that the most recent x-ray readings only corroborate what was previously seen. Employer's Brief at 13-14. Thus, employer argues that *Truitt v. North American Coal Co.*, 2 BLR 1-199 (1979) precludes an employer from being held liable as the responsible operator if the evidence demonstrates that claimant's disability did not arise out of employment in or around a mine operated by employer. 30 U.S.C. §932(c)(1).

We decline employer's invitation to decide the responsible operator issue at this time. It is premature to address employer's argument which is premised on an award of benefits based on a finding of complicated pneumoconiosis. It is as yet undetermined whether or not the administrative law judge will award benefits on remand and, if he does award benefits, whether the award will be based on a finding of complicated

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doctor and a board-certified pulmonologist, and who attributed the large opacity seen on x-ray to complicated pneumoconiosis, was entitled to great weight as he had examined claimant on a number of occasions and was aware of claimant's radiographic history as well as his PET scan and biopsy results. In weighing the opinions of Drs. Hippensteel and McSharry, which the administrative law judge found to be well-documented, the administrative law judge concluded that neither they nor the other opinions, CT scans or biopsy results provided sufficient affirmative evidence showing an intervening pathology which diminished the probative value of the x-ray evidence of large opacities. *See* Decision and Order at 27-30. *Director, OWCP v. Eastern Coal Corp.* [*Scarbro*], 220 F.3d 250, 22 BLR 2-93 (4th Cir. 2000); *Lester v. Director, OWCP*, 993 F.2d 1143, 17 BLR 2-114 (4th Cir. 2000); *see Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 21 BLR 2-323 (4th Cir. 1998); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989) (*en banc*). To the extent that these findings are tainted by the flawed analysis of the newly submitted x-ray evidence, the administrative law judge must again consider the evidence.

pneumoconiosis or on a finding of simple pneumoconiosis which became totally disabling. Hence, the issue is not ripe for resolution. *See* 33 U.S.C. §921(b)(3).

Accordingly, the administrative law judge's Decision and Order-Award of Benefits is affirmed in part, vacated in part, and the case is remanded for further consideration consistent with this opinion.

SO ORDERED.

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ROY P. SMITH
Administrative Appeals Judge

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REGINA C. McGRANERY
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge