

BRB No. 07-0993 BLA

D.R.H.)
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 Claimant-Respondent)
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 v.)
)
 COWIN & COMPANY, INCORPORATED) DATE ISSUED: 09/29/2008
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 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 – Award of Benefits of Richard T. Stansell-Gamm, Administrative Law Judge, United States Department of Labor.

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

Mary Lou Smith (Howe, Anderson & Steyer, P.C.), 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 on Remand – Award of Benefits (04-BLA-5607) of Administrative Law Judge Richard T. Stansell-Gamm 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). This case is before the Board for the second time. In the administrative law judge’s original Decision and Order, he credited claimant with eighteen years of coal mine employment

and adjudicated this subsequent claim, filed on July 15, 2002,¹ pursuant to the regulatory provisions at 20 C.F.R. Part 718 and 20 C.F.R. §725.309. The administrative law judge found that employer was properly designated the responsible operator herein, and that the evidence developed since the denial of claimant's prior claim established the existence of complicated pneumoconiosis, entitling claimant to the irrebuttable presumption of total disability due to pneumoconiosis at Section 411(c)(3) of the Act, 30 U.S.C. §921(c)(3), as implemented by 20 C.F.R. §718.304. *See* 20 C.F.R. §718.202(a)(3). The administrative law judge therefore determined that claimant established a change in an applicable condition of entitlement, as required by Section 725.309(d), and further found that employer did not rebut the presumption at 20 C.F.R. §718.203(b), that claimant's complicated pneumoconiosis arose out of coal mine employment. Accordingly, the administrative law judge awarded benefits, finding February 1, 2002 to be the onset date of claimant's complicated pneumoconiosis, and thus the date from which benefits were awarded.

On appeal, the Board did not reach claimant's arguments on the merits of the claim, but vacated several evidentiary rulings by the administrative law judge, and vacated the administrative law judge's finding that the newly-submitted evidence was sufficient to establish the existence of complicated pneumoconiosis pursuant to Section 718.304, and that claimant thereby established a change in an applicable condition of entitlement pursuant to Section 725.309(d). The Board accordingly vacated the award of benefits and the administrative law judge's onset finding pursuant to 20 C.F.R. §725.503(b), and remanded the case for further consideration and a reweighing of the evidence.² [*D.R.H.*] *v. Cowin & Co., Inc.*, BRB No. 05-0788 BLA (May 30, 2006)(unpub.).

On remand, the administrative law judge again found the newly submitted evidence sufficient to invoke the irrebuttable presumption under Section 718.304, and sufficient to demonstrate a change in an applicable condition of entitlement. Weighing

¹ Claimant's prior claim, filed on July 26, 1993, was denied because claimant did not establish the existence of pneumoconiosis. Director's Exhibit 1-1. The Board set forth the full history of claimant's initial claim in [*D.R.H.*] *v. Cowin & Co., Inc.*, BRB No. 00-0556 BLA (Apr. 24, 2001)(unpub.); [*D.R.H.*] *v. Cowin & Co., Inc.*, 21 BLR 1-147 (1999); and [*D.R.H.*] *v. Cowin & Co., Inc.*, BRB Nos. 96-1770 BLA, 96-1770 BLA-A (Sept. 29, 1997) (unpub.).

² The Board affirmed, as unchallenged on appeal, the administrative law judge's findings that claimant has eighteen years of coal mine employment and that employer is the responsible operator. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); [*D.R.H.*] *v. Cowin & Co., Inc.*, BRB No. 05-0788 BLA (May 30, 2006)(unpub.).

all the evidence of record, the administrative law judge concluded that invocation of the presumption pursuant to Section 718.304 was established, and that claimant was therefore entitled to benefits.

In the present appeal, employer challenges the administrative law judge's findings that the newly-submitted evidence and the evidence as a whole established the existence of complicated pneumoconiosis, as well as the administrative law judge's determination of the onset date. Claimant responds, urging affirmance of the administrative law judge's award of benefits. The Director, Office of Workers' Compensation Programs, has declined to file a response brief in this case.

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); *Slatick v. Director, OWCP*, 698 F.2d 433, 434, 5 BLR 2-49, 2-50 (11th Cir. 1983).

Section 411(c)(3) of the Act, implemented by Section 718.304 of the regulations, 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. The introduction of legally sufficient evidence of complicated pneumoconiosis does not automatically qualify a claimant for the irrebuttable presumption found at Section 718.304. In determining whether claimant has established invocation of the irrebuttable presumption of total disability due to pneumoconiosis pursuant to Section 718.304, the administrative law judge must weigh together all of the evidence relevant to the presence or absence of complicated pneumoconiosis. See *Pittsburg & Midway Coal Mining Co. v. Director, OWCP [Cornelius]*, 508 F.3d 975, 24 BLR 2-72 (11th Cir. 2007); *Eastern Associated Coal Corp. v. Director, OWCP [Scarbro]*, 220 F.3d 250, 22 BLR 2-93 (4th Cir. 2000); *Melnick v. Consolidation Coal Co.*, 16 BLR 1-31 (1991).

³ The Board will apply the law of the United States Court of Appeals for the Eleventh Circuit, as the miner was last employed in the coal mining industry in Alabama. See *Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989)(*en banc*); Director's Exhibits 2, 3.

Employer contends that the administrative law judge improperly characterized the x-ray evidence and applied an incorrect burden of proof in weighing the evidence of record. Specifically, employer contends that the administrative law judge misrepresented the x-ray evidence by separately considering the doctors' x-ray findings independent of the doctors' associated comments or their failure to diagnose large opacities of pneumoconiosis. Employer also alleges that by looking solely to whether evidence⁴ other than x-ray findings of large opacities "conflicts with or confirms" or "does not impeach" a finding of complicated pneumoconiosis, the administrative law judge effectively shifted the burden to employer to disprove the existence of complicated pneumoconiosis. Employer's contentions have merit.

In the instant case, the administrative law judge determined that "there is no dispute" that the October 3, 2002 and December 8, 2003 films were positive for the presence of a large opacity. The administrative law judge found that the February 15, 2002 x-ray also showed the presence of a large pulmonary opacity after according Dr. Wheeler's interpretation greater weight based upon his superior qualifications as a Board-certified radiologist and B reader. Decision and Order at 10; Employer's Exhibit 1. After determining that three of the four x-rays showed the presence of a large opacity, the administrative law judge found that the preponderance of radiographic evidence established the existence of large opacities. Decision and Order at 11. Prior to making a determination of whether claimant invoked the presumption at Section 718.304, the administrative law judge considered "all other medical evidence to determine if it conflicts with or confirms a finding that the large opacities are related to the presence of complicated pneumoconiosis." Decision and Order at 11.

The ILO classification form requires a physician interpreting an x-ray to first determine whether there are "[a]ny [p]arenchymal [a]bnormalities [c]onsistent with [p]neumoconiosis," and then to determine the size of the opacities. *See* Form CM-933. The administrative law judge considered the newly-submitted x-ray evidence and correctly noted that many physicians diagnosed Category B or C large opacities by x-ray. Decision and Order at 9-10. The administrative law judge erred, however, in concluding that the x-ray readings noting any type of abnormality, such as a mass greater than one centimeter in diameter, or suggesting alternative etiologies, such as granulomatous disease, sarcoidosis, or tuberculosis, were supportive of a finding of large opacities of pneumoconiosis pursuant to Section 718.304(a). Dr. Wheeler checked the "yes" box in response to the question of whether there were any parenchymal abnormalities consistent

⁴ Contrary to employer's contention, any error in the administrative law judge's consideration of the pulmonary function studies and arterial blood gas studies of record is harmless, as that evidence is not necessarily relevant to a finding of complicated pneumoconiosis under 20 C.F.R. §718.304. *See Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984).

with pneumoconiosis, but diagnosed “0/1, Category 0” for the February 15, 2002 film, and “1/1, Category 0 or C?” for the October 3, 2002 film. Employer’s Exhibits 1, 4. Complicated pneumoconiosis as seen on x-ray is not determined solely by the dimensions of the irregularity. After determining that a mass greater than one centimeter in diameter exists, the administrative law judge was also required to address whether the mass was due to “a chronic dust disease of the lungs,” *i.e.*, pneumoconiosis. *See* 20 C.F.R. §718.304(a)(1)-(3); *Melnick*, 16 BLR 1-31. We note additionally that the February 15, 2002 film read by Dr. Ebeo and the November 24, 2003 film read by Dr. Mehta were not performed under the ILO classification scheme pursuant to 20 C.F.R. §718.102, and should not have been considered at Section 718.304(a). Claimant’s Exhibit 5. Accordingly, we vacate the administrative law judge’s finding that the x-ray evidence was sufficient to establish the existence of complicated pneumoconiosis pursuant to Section 718.304(a), and remand this case for the administrative law judge to reweigh the x-ray evidence to determine if it establishes the existence of large opacities that support a finding of complicated pneumoconiosis. When weighing the x-ray evidence, the administrative law judge is reminded that claimant retains the burden of proving the existence of complicated pneumoconiosis by a preponderance of the evidence.

Next, pursuant to Section 718.304(b) and (c), we find merit in employer’s contention that the administrative law judge effectively shifted the burden to employer to disprove the existence of complicated pneumoconiosis by looking to whether the evidence “conflicts with or confirms” or “does not impeach” a finding of complicated pneumoconiosis. When weighing the evidence in each category pursuant to Section 718.304, the administrative law judge must evaluate the biopsy evidence at subsection (b), and evaluate the CT scan and medical opinion evidence pursuant to subsection (c), along with any other relevant evidence not applicable to subsections (a) and (b), and determine if the weight of that evidence tends to establish the existence of complicated pneumoconiosis. *Melnick*, 16 BLR at 1-33. All relevant evidence pursuant to subsections (a), (b), and (c) should then be weighed together to determine whether invocation of the irrebuttable presumption at Section 718.304 is established. As the administrative law judge’s analysis of the evidence was affected by his improper consideration of the conflicting x-ray evidence pursuant to Section 718.304(a), we vacate the administrative law judge’s findings at Sections 718.304(b), (c), and 718.203(b),⁵ and his finding of a change in an applicable condition of entitlement pursuant to Section 725.309(d), and remand the case for further consideration of the relevant evidence of record. *Gollie v. Elkay Mining Co.*, 22 BLR 1-306, 1-311 (2003); *Melnick*, 16 BLR at 1-33. On remand, the administrative law judge must first determine whether the newly

⁵ This finding at 20 C.F.R. §718.203(b), which is unchallenged on appeal, is subject to reinstatement by the administrative law judge, should he again find invocation of the irrebuttable presumption established at 20 C.F.R. §718.304 on remand.

submitted evidence is sufficient to establish a change in an applicable condition of entitlement and, if so, he should then consider and weigh all evidence of record together, both old and new, to determine whether claimant has met his burden of establishing the existence of complicated pneumoconiosis. *See Troup v. Reading Anthracite Coal Co.*, 22 BLR 1-14 (1999).

Because we have vacated the award of benefits, we also must vacate the administrative law judge's determination of the date of onset of claimant's total disability due to pneumoconiosis, and instruct him to reconsider this issue on remand, if reached. 20 C.F.R. §725.503(b); *see Rochester & Pittsburgh Coal Co. v. Krecota*, 868 F.2d 600, 12 BLR 2-178 (3d Cir. 1989); *Curse v. Director, OWCP*, 843 F.2d 456, 11 BLR 2-139 (11th Cir. 1988); *Lykins v. Director, OWCP*, 12 BLR 1-181 (1989).

Accordingly, the administrative law judge's Decision and Order on Remand – Award of Benefits is vacated, and the case is remanded for further consideration consistent with this opinion.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge