BRB No. 13-0175 BLA

DONALD BELL	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
MOUNTAIN LAUREL COAL COMPANY/ WEST VIRGINIA COAL WORKERS' PNEUMOCONIOSIS FUND, c/o WEST VIRGINIA INSURANCE COMMISSION	)	DATE ISSUED: 12/23/2013
	)	
Employer/Carrier-Respondents	)	
	)	
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 Kenneth A. Krantz, Administrative Law Judge, United States Department of Labor.

S. F. Raymond Smith (David Huffman Law Services), Parkersburg, West Virginia, for claimant.

Waseem A. Karim (Jackson Kelly, PLLC), Lexington, Kentucky, for employer.

Before: SMITH, McGRANERY and HALL, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order Denying Benefits (2011-BLA-05879) of Administrative Law Judge Kenneth A. Krantz, rendered on an initial claim filed on August 18, 2010, pursuant to the provisions of the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (Supp. 2011) (the Act). The administrative law judge determined that claimant was unable to establish entitlement under 20 C.F.R. §718.304, as the

evidence was insufficient to prove that claimant has complicated pneumoconiosis. Based on the filing date of the claim, the administrative law judge also considered claimant's entitlement under amended Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4).[1] The administrative law judge credited claimant with 15.48 years of underground coal mine employment. Because the administrative law judge also found that claimant is totally disabled by a respiratory or pulmonary impairment, he concluded that claimant invoked the rebuttable presumption of total disability due to pneumoconiosis at amended Section 411(c)(4). The administrative law judge further found that employer rebutted that presumption by establishing that claimant does not have pneumoconiosis. Accordingly, benefits were denied.

On appeal, claimant argues that the administrative law judge erred in finding that he does not have complicated pneumoconiosis. Claimant also contends that the administrative law judge erred in relying on speculative evidence to find that employer rebutted the amended Section 411(c)(4) presumption. Employer responds, urging affirmance of the denial of benefits.[2] The Director, Office of Workers' Compensation Programs, has not filed a response brief.

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).

Section 411(c)(3) of the Act, 30 U.S.C. §921(c)(3), as implemented by 20 C.F.R. §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

[1] Under amended Section 411(c)(4), claimant is entitled to a rebuttable presumption that he is totally disabled due to pneumoconiosis if he establishes at least fifteen years of underground coal mine employment, or coal mine employment in conditions substantially similar to those in an underground mine, and a totally disabling respiratory impairment. *See* 30 U.S.C. §921(c)(4), as implemented by 78 Fed. Reg. 59,102, 59,114 (Sept. 25, 2013) (to be codified at 20 C.F.R. §718.305).

[2] We affirm, as unchallenged by employer on appeal, the administrative law judge's finding that claimant invoked the amended Section 411(c)(4) presumption. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

[3] This case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit, as claimant's coal mine employment was in West Virginia. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Director's Exhibit 3.

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, 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, however, automatically invoke the irrebuttable presumption found at 20 C.F.R. §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 pneumoconiosis, resolve any conflicts, and make a finding of fact. *See Westmoreland Coal Co. v. Cox*, 602 F.3d 276, 24 BLR 2-269 (4th Cir. 2010); *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) (en banc).

Pursuant to 20 C.F.R. §718.304(a), the administrative law judge noted that the record contained three readings of one analog x-ray dated October 4, 2010. Decision and Order 19-20. The administrative law judge found that Dr. Forehand, a B reader, read the x-ray as positive for simple and complicated pneumoconiosis, Category A, whereas Dr. Shipley, dually qualified as a Board-certified radiologist and B reader, and Dr. Castle, a B reader, each read the x-ray as negative for simple and complicated pneumoconiosis. Decision and Order at 19-20. In resolving the conflict in the x-ray evidence, the administrative law judge credited Dr. Shipley's negative reading, based on his "superior qualifications." *Id*. at 20. The administrative law judge determined, therefore, that the October 4, 2010 x-ray was negative for both simple and complicated pneumoconiosis. *Id*. The administrative law judge did not render any findings pursuant to 20 C.F.R. §718.304(b) or (c). He concluded that claimant does not suffer from complicated pneumoconiosis.

Claimant argues that the administrative law judge did not consider whether the negative readings for simple and complicated pneumoconiosis by Dr. Shipley were speculative. We agree. On the ILO classification form for the October 4, 2010 x-ray, Dr. Shipley checked-marked boxes indicating that there were no parenchymal or pleural abnormalities consistent with pneumoconiosis. Director's Exhibit 11. Dr. Shipley, however, noted that there were other abnormalities on the film and wrote, "probably not [coal workers' pneumoconiosis] – consider CT to rule out malignancy." *Id*. In a narrative report dated February 28, 2001, Dr. Shipley explained that "there was no evidence of *upper zone* predominate small round opacities to suggest coal workers' pneumoconiosis." *Id*. (emphasis added). He noted, however that claimant had "ill-defined lobulated noncalcified nodular lesions" in "the *mid zone* laterally." *Id*. (emphasis added). Dr. Shipley opined that, "because of the absence of background small rounded

opacities, these are unlikely to represent large opacities of pneumoconiosis." *Id*. He recommended comparison with other x-rays to rule out a malignancy and a CT scan "to better characterize" the x-ray findings. *Id*. The record also reflects that, on the ILO classification form completed by Dr. Forehand with respect to the October 4, 2010 x-ray, Dr. Forehand wrote that claimant had a negative PET scan and that a "previous work up [was] negative for malignancy." Director's Exhibit 10.

In *Cox*, the United States Court of Appeals for the Fourth Circuit held that an administrative law judge, in weighing conflicting x-ray readings, has the discretion to discount, as speculative and unsupported, negative x-ray readings for complicated pneumoconiosis where there is no evidence in the record that the claimant was ever diagnosed with, or treated for, any of the alternative diseases or conditions put forward by the physicians as possible diagnoses for large masses present on the miner's x-rays. *See Cox*, 602 F.3d at 285-87, 24 BLR at 2-282-84. Under the facts of this case, we conclude that the administrative law judge erred in relying on Dr. Shipley's negative reading, based solely on his credentials, without addressing the qualified nature of Dr. Shipley's opinion regarding the cause of the lesions he observed in claimant's mid-lung zone. *See Id.*; *Justice v. Island Creek Coal Co.*, 11 BLR 1-91, 1-94 (1988); *Campbell v. Director, OWCP*, 11 BLR 1-16, 1-19 (1987). Thus, because the administrative law judge did not adequately explain the weight accorded the conflicting x-ray evidence, we vacate his finding pursuant to 20 C.F.R. 718.304(a). *See Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162 (1989); *McCune v. Central Appalachian Coal Co.*, 6 BLR 1-966 (1984). Consequently, we vacate the denial of benefits and remand the case for further consideration of whether claimant established the existence of complicated pneumoconiosis.

Additionally, the administrative law judge erred in his analysis of whether employer rebutted the amended Section 411(c)(4) presumption. Because claimant invoked the presumption of total disability due to pneumoconiosis pursuant to Section 411(c)(4), the burden of proof shifted to employer to establish that claimant does not have either clinical or legal pneumoconiosis[4] or that his disabling respiratory or pulmonary impairment "did not arise out of, or in connection with," coal mine employment. *See* 30 U.S.C. §921(c)(4); 20 C.F.R. §718.305(d)(1)(i), (ii); 65 Fed Reg.

[4] Clinical pneumoconiosis consists of "those diseases recognized by the medical community as pneumoconioses, *i.e.*, the conditions characterized by permanent deposition of substantial amounts of particulate matter in the lungs and the fibrotic reaction of the lung to that deposition caused by dust exposure in coal mine employment." 20 C.F.R. §718.201(a)(1). Legal pneumoconiosis "includes any chronic lung disease or impairment and its sequelae arising out of coal mine employment." 20 C.F.R. §718.201(a)(2).

59,102, 59,106 (Sept. 25, 2013); *Barber v. Director, OWCP*, 43 F.3d 899, 901, 19 BLR 2-61, 2-67 (4th Cir. 1995); *Rose v. Clinchfield Coal Co.*, 614 F.2d 936, 939, 2 BLR 2-38, 2-43-44 (4th Cir. 1980). The administrative law judge specifically found that the presumed fact of clinical pneumoconiosis was rebutted, based on Dr. Shipley's negative reading of the October 4, 2010 analog x-ray. Decision and Order at 26. However, as discussed, *supra*, the administrative law judge failed to consider Dr. Shipley's additional comments with regard to the etiology of claimant's mid-lung zone nodules and determine if his opinion is credible and sufficient to satisfy employer's burden to *affirmatively* establish that claimant does not have clinical pneumoconiosis. *See Morrison v. Tenn. Consol. Coal Co.*, 644 F.3d 473, 479, 25 BLR 2-1, 2-8 (6th Cir. 2011); *Justice*, 11 BLR at 1-94. We, therefore, vacate the administrative law judge's finding that employer rebutted the presumed fact of clinical pneumoconiosis. Furthermore, to the extent the administrative law judge's finding that the x-ray evidence was negative for simple pneumoconiosis also influenced his weighing of the conflicting medical opinions regarding legal pneumoconiosis, we vacate his finding that employer rebutted the presumed fact of legal pneumoconiosis.

Accordingly, the administrative law judge's Decision and Order Denying Benefits is vacated and the case is remanded to the administrative law judge 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