BRB No. 09-0868 BLA

OAKLEY JOHNSON	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
ARCH ON THE NORTH FORK	)	
	)	
and	)	DATE ISSUED: 09/21/2010
	)	
UNDERWRITERS SAFETY & CLAIMS	)	
	)	
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 on Remand of Donald W. Mosser, Administrative Law Judge, United States Department of Labor.

James D. Holliday, Hazard, Kentucky, for claimant.

Ronald E. Gilbertson (K&L Gates LLP), Washington, D.C., for employer.

Rita Roppolo (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, SMITH and HALL, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order on Remand (05-BLA-6117) of Administrative Law Judge Donald W. Mosser rendered on a subsequent claim filed on August 2, 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).[1] This case is before the Board for the second time.

In the prior appeal, the Board affirmed in part, and vacated in part, the administrative law judge's award of benefits and remanded the case for further consideration. *O.J.* [*Johnson*] *v. Arch on the North Fork*, BRB No. 07-0996 BLA (Sept. 18, 2008)(unpub.). Specifically, the Board affirmed, as unchallenged, the administrative law judge's finding that claimant failed to establish, with new evidence, the existence of a totally disabling respiratory impairment pursuant to 20 C.F.R. §718.204(b), but vacated the administrative law judge's finding that the new evidence established complicated pneumoconiosis pursuant to 20 C.F.R. §718.304. *Johnson*, slip op. at 3, 5-13. The Board, therefore, vacated the administrative law judge's finding that a change in the applicable condition of entitlement was established pursuant to 20 C.F.R. §725.309(d).

Pursuant to 20 C.F.R. §718.304(a), the Board instructed the administrative law judge, on remand, to consider all of the relevant new x-ray evidence in determining whether the x-ray evidence established large opacities of complicated pneumoconiosis. *Johnson*, slip op. at 9. Pursuant to 20 C.F.R. §718.304(c), the Board instructed the administrative law judge to consider all of the relevant new computerized tomography (CT) scan and medical opinion evidence. *Johnson*, slip op. at 7-12. Additionally, the Board instructed the administrative law judge to consider whether Dr. Alexander's opinion, which took into account his CT scan reading, his readings of digital and conventional x-rays, and the biopsy evidence,[2] was admissible as a CT scan reading, a

[1] By Order dated June 18, 2010, the Board provided the parties with the opportunity to address the impact on this case, if any, of Section 1556 of Public Law No. 111-148, which amended the Act with respect to the entitlement criteria for certain claims. Claimant, employer and the Director, Office of Workers' Compensation Programs), responded, and agree that the recent amendments to the Act, which became effective on March 23, 2010, do not apply to this case, as it involves a miner's claim filed before January 1, 2005.

[2] On April 15, 2004, claimant underwent a surgical wedge resection biopsy of a mass in his left upper lung. Director's Exhibit 28. The biopsy of the lung specimen, performed by Dr. Dubilier, revealed the presence of a 1.5 centimeter lesion, described as an anthracotic nodule. Director's Exhibit 28. Dr. Dubilier's final diagnosis was nodular anthracosilicosis with marked fibrosis. Director's Exhibit 28. The administrative law judge found that "Dr. Dubilier did not state that this nodule equated to a 'massive

medical report, or both, pursuant to 20 C.F.R. §§718.107, 725.414(a)(2)(i), (ii).[3] *Johnson*, slip op. at 9. The Board also instructed the administrative law judge to address whether Dr. Alexander's opinion, to the extent it relied on readings of both the digital x-rays, and the conventional x-rays dated July 29, 2004 and November 30, 2004, was based on inadmissible evidence.[4] *Johnson*, slip op. at 9. Further, the Board instructed the administrative law judge to consider the extent to which Dr. Jarboe's opinion was based on his own reading of a November 30, 2004 x-ray, which had not been admitted into the record. *Johnson*, slip op. at 12 n.9.

On remand, the administrative law judge found that claimant failed to establish the existence of complicated pneumoconiosis and, thus, failed to invoke the irrebuttable presumption of total disability due to pneumoconiosis at 20 C.F.R. §718.304. The administrative law judge therefore determined that claimant did not establish a change in the applicable condition of entitlement pursuant to 20 C.F.R. §725.309(d). Accordingly, the administrative law judge denied benefits.

On appeal, claimant contends that the administrative law judge erred in finding that the new evidence failed to establish the existence of complicated pneumoconiosis pursuant to 20 C.F.R. §718.304. Specifically, claimant asserts that the administrative law

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lesion,'" pursuant to 20 C.F.R. §718.304(b). Decision and Order on Remand at 8. Nor did Dr. Dubilier "make an equivalency determination regarding the size this nodule would appear on a chest x-ray." Decision and Order on Remand at 8. As claimant does not challenge these findings on appeal, they are affirmed. *See Coen v. Director, OWCP*, 7 BLR 1-30, 1-33 (1984); *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

[3] The record reflects that claimant designated Dr. Alexander's report as a computerized tomography (CT) scan reading that he sought to admit as "other medical evidence" under 20 C.F.R. §718.107. Administrative Law Judge's Exhibit 1 at 7.

[4] The Board noted that it was unclear whether Dr. Alexander was referencing digital and conventional x-ray readings already of record, or was referring to his own x-ray readings. *O.J.* [*Johnson*] *v. Arch on the North Fork*, BRB No. 07-0996 BLA (Sept. 18, 2008)(unpub.), slip op. at 9-10 n.7. The Board also noted that the admission of digital x-rays is properly considered under 20 C.F.R. §718.107, and held that the administrative law judge must determine, on a case-by-case basis, whether the party proffering the digital x-ray, or "other medical evidence," has established its medical acceptability. *Johnson*, slip op. at 10-11 n.8, *citing Webber v. Peabody Coal Co.*, 23 BLR 1-123, 1-133 (2006)(*en banc*)(Boggs, J., concurring), *aff'd on recon.*, 24 BLR 1-1, 1-7-8 (2007)(*en banc*).

judge erred in excluding Dr. Alexander's CT scan reading, submitted by claimant. Claimant further asserts that the administrative law judge erred in weighing the x-ray and medical opinion evidence pursuant to 20 C.F.R. §718.304(a), (c). Employer responds in support of the administrative law judge's denial of benefits. The Director, Office of Workers' Compensation Programs, has not filed a response brief relevant to the merits of entitlement.

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.[5] 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). The Board reviews the administrative law judge's procedural rulings for abuse of discretion. *See Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-153 (1989)(*en banc*).

We initially address claimant's challenge to the administrative law judge's exclusion of Dr. Alexander's CT scan reading, as not in compliance with the admissibility requirements of 20 C.F.R. §718.107(b). Claimant's Brief at 3. Claimant's argument lacks merit.

On remand, the administrative law judge considered the interpretations by Drs. Alexander and Wheeler of a CT scan performed on March 4, 2004. In his report dated September 15, 2006, Dr. Alexander noted that, in addition to the CT scan, "AP and lateral digital chest x-rays used as scout images for the CT scan [were] also available." Claimant's Exhibit 1. Dr. Alexander presented his findings as follows:

> The digital chest x-ray images demonstrate a background of small round and irregular opacities and a large round opacity in the left upper zone measuring greater that 10.0mm, consistent with complicated Coal Worker's Pneumoconiosis, category A. On the CT images, there is a 20.0mm large opacity in the left upper zone seen on image #3 that corresponds in size and location to the large opacity seen on the digital chest x-ray, confirming the presence of complicated Coal Worker's Pneumoconiosis. Below this level on image #6, there is also a 15mm large opacity in the left upper zone which may also be caused by complicated Coal Worker's Pneumoconiosis.

[5] The record indicates that claimant's coal mine employment was in Kentucky. Director's Exhibits 1, 3. Accordingly, this case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989)(*en banc*).

Claimant's Exhibit 1. By contrast, Dr. Wheeler opined that the March 4, 2004 CT scan was not consistent with pneumoconiosis but revealed "1.5 cm nodules in the [left upper lobe] and left apex and [a] 1.5 cm nodule in the superior segment [left lower lobe] compatible with granulomatous disease, TB or histoplasmosis." Employer's Exhibit 1.

Considering the CT scan evidence, the administrative law judge properly noted that CT scans and digital x-rays constitute "other medical evidence," the admissibility of which is governed by 20 C.F.R. §718.107. *Webber v. Peabody Coal Co.*, 23 BLR 1-123, 1-135 (2006)(*en banc*)(Boggs, J., concurring), *aff'd on recon.*, 24 BLR 1-1, 1-7-8 (2007)(*en banc*). Decision and Order on Remand at 5. The administrative law judge further correctly noted that, pursuant to 20 C.F.R. §718.107(b), an administrative law judge must determine, on a case-by-case basis, whether the proponent of the digital x-ray or CT scan evidence has established that it is medically acceptable and relevant to entitlement. *See Webber*, 23 BLR at 1-133; Decision and Order on Remand at 5. Finding that "Drs. Alexander and Wheeler do not state in their respective reports that the tests are medically acceptable, nor does the record contain any additional evidence establishing the acceptability and relevancy of these tests," the administrative concluded that "the CT scan reports should be excluded because the record fails to establish the medical acceptability of the CT scan and digital chest x-rays on which either physician relied." Decision and Order on Remand at 5.

Claimant contends that the administrative law judge erred in determining that the record does not contain any additional evidence establishing the acceptability and relevancy of CT scans. Claimant asserts that, attached to Dr. Jarboe's deposition, which was submitted by employer and admitted into the record, was a list of references including an article by Dr. Remy-Jardin, addressing the superiority of CT scans over chest radiography.[6] Claimant's Brief at 4-5; Employer's Exhibit 35-55. Claimant contends that the full text of this article is available on the internet, and that the administrative law judge erred in failing to take judicial notice of its contents.[7] Claimant's Brief at 4-5.

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[6] Claimant acknowledges that the proponent of the digital x-ray or CT scan evidence has the burden of establishing its medical acceptability and relevancy. Claimant asserts, however, that because both claimant and employer submitted CT scans that were excluded by the administrative law judge, employer's proof as to the medical acceptability and relevancy of CT scans validates both claimant's and employer's CT scan reports. Claimant's Brief at 5.

[7] Claimant does not assert that the record contains evidence addressing the medical acceptability or relevancy of digital x-rays for establishing the existence of complicated pneumoconiosis.

Contrary to claimant's assertion, it was his obligation to obtain and submit evidence relevant to the admissibility of the CT scan and digital x-rays upon which Dr. Alexander relied. *See* 20 C. F.R. §718.107(b). Although the administrative law judge could have taken judicial notice of the article listed as a reference for Dr. Jarboe's deposition, he was not required to do so. *See* 29 C.F.R. §18.45; *Maddaleni v. Pittsburg & Midway Coal Mining Co.*, 14 BLR 1-135 (1990); *Onderko v. Director, OWCP*, 14 BLR 1-2 (1989). We, therefore, affirm the administrative law judge's exclusion of Dr. Alexander's and Dr. Wheeler's CT scan interpretations, pursuant to 20 C.F.R. §718.107(b).

To establish entitlement 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. Where a miner files a claim for benefits more than one year after the final denial of a previous claim, the subsequent claim must also be denied unless the administrative law judge finds that "one of the applicable conditions of entitlement . . . has changed since the date upon which the order denying the prior claim became final." 20 C.F.R. §725.309(d). The "applicable conditions of entitlement" are "those conditions upon which the prior denial was based." 20 C.F.R. §725.309(d)(2); *White v. New White Coal Co.*, 23 BLR 1-1, 1-3 (2004). Claimant established the existence of simple pneumoconiosis is his prior claim. His prior claim was denied, however, because he failed to establish the existence of a totally disabling respiratory impairment. Director's Exhibit 1. Consequently, claimant had to submit new evidence establishing this element of entitlement to obtain review of the merits of his claim. 20 C.F.R. §725.309(d)(2), (3).

One method of establishing total disability is by means of the irrebuttable presumption set forth at 20 C.F.R. §718.304. *See* 20 C.F.R. §718.204(b)(1). Under Section 411(c)(3) of the Act, 30 U.S.C. §923(c)(3), and its implementing regulation, 20 C.F.R. §718.304, there is an irrebuttable presumption that a miner is totally disabled due to pneumoconiosis, if (A) an x-ray of the miner's lungs shows an opacity greater than one centimeter that would be classified as Category A, B, or C; (B) a biopsy or autopsy shows massive lesions in the lung; or (C) when diagnosed by other means, the condition could reasonably be expected to reveal a result equivalent to (A) or (B). *See* 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 20 C.F.R. §718.304. The administrative law judge must consider all relevant evidence on this issue, *i.e.*, evidence that supports a finding of complicated pneumoconiosis, as well as evidence that does not support a finding of complicated pneumoconiosis, resolve the conflicts, and make a finding of fact. *See Gray v. SLC Coal Co.*, 176 F.3d 382, 21 BLR 2-615 (6th Cir. 1999); *Melnick v. Consolidation Coal Co.*, 16 BLR 1-31, 1-33 (1991)(*en banc*).

Claimant asserts that the administrative law judge erred in finding that the x-ray evidence does not establish complicated pneumoconiosis under 20 C.F.R. §718.304(a). Specifically, claimant asserts that the administrative law judge erred in failing to weigh Dr. Alexander's readings of the July 29, 2004 and November 30, 2004 x-rays, which were contained in his CT scan report, together with the remaining x-ray evidence of record. Claimant's Brief at 6-8.

As claimant asserts, in his CT scan report, Dr. Alexander noted that "chest x-rays dated 07/29/04 and 11/30/04" were performed after claimant underwent a surgical wedge resection biopsy of a left upper zone mass identified on the March 4, 2004 CT scan. Claimant's Brief at 7; Claimant's Exhibit 1. Dr. Alexander stated that the x-rays:

> Demonstrate a smaller 10.0mm left upper zone mass with adjacent surgical clips, making it impossible to determine if that left upper zone density is produced by a residual abnormal mass or post biopsy scar. Those chest x-rays do confirm the presence of small pneumoconiotic opacities with a profusion of 1/1.

Claimant's Exhibit 1. Considering Dr. Alexander's report, the administrative law judge initially found that Dr. Alexander's readings of the July 29, 2004 and November 30, 2004 x-rays had not been submitted into the record, and further, were not in substantial compliance with the regulations. Decision and Order on Remand at 6 n.5. The administrative law judge did not weigh Dr. Alexander's x-ray readings together with the other x-ray evidence at 20 C.F.R. §718.304(a).

Claimant asserts that, contrary to the administrative law judge's analysis, the fact that Dr. Alexander's x-ray readings were contained in his CT scan report, and were not submitted separately on ILO x-ray classification forms, did not preclude their consideration pursuant to 20 C.F.R. §718.304(a). Decision and Order on Remand at 6 n.5; Claimant's Brief at 7-8; *see also Marra v. Consolidation Coal Co.*, 7 BLR 1-216, 1-218-19 (1984). Claimant acknowledges, however, and the record reflects, that Dr. Alexander did not interpret either the July 29, 2004 or November 30, 2004 x-ray as showing large opacities of complicated pneumoconiosis. Rather, he opined that these x-rays showed only the "presence of small pneumoconiotic opacities with a profusion of 1/1." Claimant's Brief at 7; Claimant's Exhibit 1.

As noted above, claimant established the presence of simple pneumoconiosis in his prior denied claim. *Johnson*, slip op. at 6 n.4. In the current claim, the only issue before the administrative law judge, on remand, was whether claimant established the existence of complicated pneumoconiosis and, thus, established invocation of the irrebuttable presumption of total disability due

to pneumoconiosis at 20 C.F.R. §718.304. *Johnson*, slip op. at 3 n.2, 12-13. As Dr. Alexander's readings of the July 29, 2004 and November 30, 2004 x-rays do not support a finding of complicated pneumoconiosis, any error by the administrative law judge in characterizing those x-ray readings as either inadmissible, or as not in substantial compliance with the quality standards, is harmless. *See Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984)(holding that error that does not affect the disposition of the case is harmless). Consequently, as claimant raises no other arguments pertaining to the administrative law judge's evaluation of the x-ray evidence, we affirm his finding that claimant failed to establish the existence of complicated pneumoconiosis pursuant to 20 C.F.R. §718.304(a).

Claimant additionally asserts that the administrative law judge failed to offer a valid reason for discounting the medical opinion of Dr. Alexander pursuant to 20 C.F.R. §718.304(c).

The administrative law judge correctly noted that, in addition to interpreting the March 4, 2004 CT scan and associated digital x-ray interpretations, Dr. Alexander also commented on the July 29, 2004 and November 30, 2004 conventional x-rays, and the pathology report from the April 14, 2004 wedge resection. Decision and Order on Remand at 6 n.5; Claimant's Exhibit 1. Finding that Dr. Alexander's readings of the July 29, 2004 and November 30, 2004 x-rays had not been submitted into the record as initial x-ray evidence pursuant to 20 C.F.R. §725.414(a)(2)(i), the administrative law judge concluded that "because the extent of his reliance on inadmissible evidence is unclear," Dr. Alexander's medical opinion was entitled to diminished weight. *Id*.

Claimant contends that, in discounting Dr. Alexander's report as based on inadmissible evidence, the administrative law judge acted inconsistently because he did not similarly discredit Dr. Jarboe's opinion, despite finding that "Dr. Jarboe's depos[ition] testimony and his opinions contained therein . . . were based in part on inadmissible evidence." Decision and Order on Remand at 6; Claimant's Brief at 8. Based on this allegation of error, claimant contends that the administrative law judge's finding at 20 C.F.R. §718.304(c) is flawed and must be vacated. We disagree.

We have affirmed the administrative law judge's exclusion, pursuant to 20 C.F.R. §718.107(b), of Dr. Alexander's interpretations of the CT scan and associated digital x-ray scout images, upon which Dr. Alexander principally relied in concluding that claimant has complicated pneumoconiosis, Category A. Dr. Alexander's additional opinion, that the July 29, 2004 and November 30, 2004 x-rays are positive for simple pneumoconiosis, 1/1, is not relevant to the issue before

the administrative law judge for resolution. Nor does Dr. Alexander's discussion of the biopsy results contain a diagnosis of complicated pneumoconiosis or "massive lesions," sufficient to establish the presence of the disease pursuant to 20 C.F.R. §718.304(b).[8] Because the administrative law judge permissibly excluded claimant's CT scan and digital x-ray evidence that Dr. Alexander relied upon to diagnose complicated pneumoconiosis, any errors that he may have made in discrediting the remaining portion of Dr. Alexander's opinion, which addressed only the existence of simple pneumoconiosis, or in crediting the opinion of Dr. Jarboe, are harmless. *See Larioni*, 6 BLR at 1-1278. Consequently, we affirm the administrative law judge's finding that claimant failed to establish the existence of complicated pneumoconiosis pursuant to 20 C.F.R. §718.304(c).

We, therefore, affirm the administrative law judge's finding that claimant failed to establish the existence of complicated pneumoconiosis and, thus, failed to establish invocation of the irrebuttable presumption of total disability due to pneumoconiosis at 20 C.F.R. §718.304. *See Gray*, 176 F.3d at 382, 21 BLR at 2-615. Thus, we further affirm the administrative law judge's determination that claimant did not establish a change in the applicable condition of entitlement pursuant to 20 C.F.R. §725.309(d), and we affirm the administrative law judge's denial of benefits.

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[8] Discussing the biopsy results, Dr. Alexander stated:

> On 04/15/04, [claimant] underwent a surgical wedge resection biopsy of the left upper zone mass seen on the 03/09/04 [*sic*] CT. Both surgical specimens demonstrated multiple anthracotic nodules, the largest of which measured 15.0mm. This confirms that the left upper zone large opacity seen on the pre-operative chest CT scan is in fact caused by complicated Coal Worker's Pneumoconiosis, and the final diagnosis of the surgical pathology report is nodular anthracosilicosis.

Claimant's Exhibit 1. While Dr. Alexander opined that the biopsy results, taken together with the CT scan results, confirm the presence of complicated pneumoconiosis, the administrative law judge permissibly excluded Dr. Alexander's CT scan reading. Without the supporting CT scan, as Dr. Alexander notes, the biopsy simply supports a diagnosis of "nodular anthracosilicosis." Claimant's Exhibit 1; Director's Exhibit 28; n.2, *supra*.

Accordingly, the administrative law judge's Decision and Order on Remand denying benefits is affirmed.

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