BRB No. 10-0230 BLA

CUBERT SPENCE	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
WEST VIRGINIA SOLID ENERGY, INCORPORATED	)	
	)	
	)	DATE ISSUED: 12/23/2010
Employer-Petitioner	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Second Decision and Order on Remand Awarding Benefits of Linda S. Chapman, Administrative Law Judge, United States Department of Labor.

Stephen A. Sanders (Appalachian Citizens Law Center, Inc.), Whitesburg, Kentucky, for claimant.

Laura Metcoff Klaus and W. William Prochot (Greenberg Traurig LLP), Washington, D.C. for employer.

Helen H. Cox (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: SMITH, McGRANERY, and BOGGS, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Second Decision and Order on Remand Awarding Benefits (05-BLA-0018) of Administrative Law Judge Linda S. Chapman (the administrative law

judge) rendered on a duplicate claim filed 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, which is now being considered pursuant to claimant's request for modification of the denial of his duplicate claim, is before the Board for the fifth time.[2] In the most recent appeal, filed by employer, the Board vacated the administrative law judge's findings that, because the new evidence established complicated pneumoconiosis, claimant established a material change in conditions and entitlement to benefits. *See* 20 C.F.R. §725.309(d) (2000). The Board held that the administrative law judge failed to apply the proper standard in weighing the evidence relevant to the existence of complicated pneumoconiosis, and further erred in her consideration of the x-ray, biopsy, computerized tomography (CT) scan, and medical opinion evidence. *C.S.* [*Spence*] *v. W. Va. Solid Energy, Inc.*, BRB No. 08-0159 BLA (Nov. 25, 2008)(unpub.). Consequently, the Board remanded the case for the administrative law judge to put the burden of proof on claimant, and to consider all relevant evidence prior to invocation of the irrebuttable presumption at 20 C.F.R. §718.304, consistent with *Gray v. SLC Coal Co.*, 176 F.3d 382, 389, 21 BLR 2-615, 2-628-29 (6th Cir. 1999). More specifically, the Board instructed the administrative law judge to reconsider all relevant evidence pursuant to Section 718.304(a)-(c), including the evidence submitted prior to claimant's modification request, and to then weigh the evidence from each category together, and determine whether the weight of the evidence, as a whole, establishes complicated pneumoconiosis pursuant to Section 718.304. *Spence*, BRB No. 08-0159 BLA, slip op. at 8-9. The Board additionally instructed the administrative law judge that, if she again found claimant entitled to benefits, she must explain the basis for her finding that there was a mistake of fact in the previous denial of claimant's duplicate claim. *Id*. at 9; *see* 20 C.F.R. §725.310 (2000).

[1] The Department of Labor has amended the regulations implementing the Federal Coal Mine Health and Safety Act of 1969, as amended. These regulations became effective on January 19, 2001, and are found at 20 C.F.R. Parts 718, 722, 725, and 726 (2010). All citations to the regulations, unless otherwise noted, refer to the amended regulations. Where a former version of a regulation remains applicable, we will cite to the 2000 version of the Code of Federal Regulations.

[2] This claim, which is claimant's fourth, was filed on October 29, 1999. Director's Exhibit 1. We incorporate by reference the complete procedural history of this case, as set forth in the Board's prior decisions. *Spence v. W. Va. Solid Energy, Inc.*, BRB No. 01-0724 BLA (Apr. 25, 2002)(unpub.), *Spence v. W. Va. Solid Energy, Inc.*, BRB No. 03-0236 BLA (Oct. 20, 2003)(unpub.), *Spence v. W. Va. Solid Energy, Inc.*, BRB Nos. 06-0402 BLA and 06-0402 BLA-A (Feb. 28, 2007)(unpub.), *C.S.* [*Spence*] *v. W. Va. Solid Energy, Inc.*, BRB No. 08-0159 BLA (Nov. 25, 2008)(unpub.).

On remand, the administrative law judge again found that the evidence submitted on modification established invocation of the irrebuttable presumption at Section 718.304, and that therefore, claimant established a material change in conditions since the denial of his prior claim. The administrative law judge then summarized the evidence originally submitted in the duplicate claim, and found that there was no mistake of fact in Administrative Law Judge Daniel J. Roketenetz's 2002 decision denying the duplicate claim. She found that claimant "established a material change in condition since Judge Roketenetz's previous denial" of the duplicate claim in 2002. Decision and Order on Remand at 10. The administrative law judge further concluded, however, that "Judge Roketenetz's decision, which did not take into account the newer evidence, was mistaken in the ultimate fact of entitlement." *Id*. The administrative law judge therefore granted claimant's request for modification, and awarded benefits beginning in October 1999, the month in which claimant filed this claim. *Id*. at 11.

On appeal, employer asserts that the administrative law judge failed to comply with the Board's instructions on remand, and erred in her analysis of the x-ray, CT scan, and medical opinion evidence relevant to the existence of complicated pneumoconiosis. Employer further asserts that the administrative law judge erred in awarding benefits as of October 1999. Claimant responds, urging affirmance of the award of benefits. The Director, Office of Workers' Compensation Programs (the Director), declined to file a brief in response to claimant's appeal.

By Order dated October 13, 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 claims that were filed after January 1, 2005, and which were pending on March 23, 2010. Claimant and the Director have responded, stating, correctly, that the recent amendments to the Act do not apply to this claim, because it was filed before January 1, 2005.

The Board's scope of review is defined by statute. The administrative law judge's Decision and Order must be affirmed if it is supported by substantial evidence, is rational, and is in accordance with law.[3] 33 U.S.C. §921(b)(3), as incorporated into the Act by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

[3] The record indicates that claimant's last coal mine employment was in Kentucky. Director's Exhibits 2, 36 at 269. Accordingly, the Board will apply the law of the United States Court of Appeals for the Sixth Circuit. *Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*).

To establish entitlement to benefits under the Act, claimant must establish the existence of pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, and that the pneumoconiosis is totally disabling. 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 duplicate claim must also be denied unless the administrative law judge finds that there has been a "material change in conditions" since the denial of the previous claim. 20 C.F.R. §725.309(d) (2000). In this case, claimant's prior claim was denied because he failed to establish total disability. Director's Exhibit 36. Consequently, claimant was required to submit new evidence establishing that element of entitlement in order to obtain review of the merits of his duplicate claim. *See* 20 C.F.R. §725.309(d) (2000); *Sharondale Corp. v. Ross*, 42 F.3d 993, 19 BLR 2-10 (6th Cir. 1994). In considering a request for modification of the denial of a duplicate claim (which, as here, was denied based upon a failure to establish a material change in conditions), an administrative law judge must determine whether all of the evidence developed in the duplicate claim, including any new evidence submitted with the request for modification, establishes a material change in conditions. *See* 20 C.F.R. §725.309(d) (2000); *Hess v. Director, OWCP*, 21 BLR 1-141, 1-143 (1998). If the evidence establishes a material change in conditions, the administrative law judge must then consider the merits of the duplicate claim. *Hess*, 21 BLR at 1-143.

One method of establishing total disability is by means of the irrebuttable presumption set forth at 20 C.F.R. §718.304. 20 C.F.R. §718.204(b)(1). Section 411(c)(3) of the Act, 30 U.S.C. §921(c)(3), 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 that 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 20 C.F.R. §718.304. The administrative law judge must consider all relevant evidence on this issue, that is, 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*, 176 F.3d at 388-89, 21 BLR at 2-626-29; *Melnick v. Consolidation Coal Co.*, 16 BLR 1-31, 1-33 (1991) (*en banc*).

Employer initially contends that the administrative law judge erred in finding that the x-ray evidence supports a finding of complicated pneumoconiosis because she failed to state the weight she assigned to Dr. Smith's x-ray reading. Employer's Brief at 13. We disagree. Relevant to 20 C.F.R. §718.304(a), the administrative law judge considered

six interpretations of two x-rays, dated January 22, 2004 and April 3, 2004, that were submitted on modification.[4] The administrative law judge accurately observed that the two x-rays were taken less than four months apart. Based on both the quantity of the readings and the qualifications of the x-ray readers, the administrative law judge permissibly determined that "the preponderance of the interpretations by the most highly qualified interpreters" established the existence of Category A large opacities. Second Decision and Order on Remand at 6; *see Staton v. Norfolk & Western Ry. Co.*, 65 F.3d 55, 59, 19 BLR 2-271, 2-279 (6th Cir. 1995); *Woodward v. Director, OWCP*, 991 F.2d 314, 321, 17 BLR 2-77, 2-87 (6th Cir. 1993). Consequently, we reject employer's assertion that the administrative law judge erred in failing to state what weight she assigned to Dr. Smith's x-ray reading, and affirm the administrative law judge's finding that "the x-ray evidence as a whole indicates a condition of such severity that it would produce opacities greater than one centimeter in diameter on an x-ray."[5] Second Decision and Order on Remand at 6; *see Gray*, 176 F.3d at 389, 21 BLR 2-628-29; *Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162, 1-165 (1989).

Employer additionally asserts that the administrative law judge erred in her consideration of the CT scan and medical opinion evidence pursuant to 20 C.F.R.

[4] The January 22, 2004 x-ray was interpreted by Dr. Forehand, a B reader, and by Dr. Barrett, a Board-certified radiologist and B reader, as positive for Category A large opacities, while Dr. Dahhan, a B reader, reported that this x-ray showed "O" large opacities, meaning that it was negative for large opacities. Director's Exhibits 75, 77, 90; Employer's Exhibit 4. The April 3, 2004 x-ray was interpreted as positive for Category A large opacities by Dr. Dahhan, and by Dr. Cappiello, a Board-certified radiologist and B reader. Director's Exhibit 96; Claimant's Exhibit 4. Dr. Smith, a Board-certified radiologist and B reader, read the same x-ray as negative for large opacities. Employer's Exhibit 5. In a subsequent narrative report regarding the April 3, 2004 x-ray, Dr. Dahhan stated that his, "[f]inal ILO classification is Q/Q, 2/2, question A large opacity/question right lung mass, coalescence and post op changes in the right chest." Director's Exhibit 93-3.

[5] We reject employer's assertion that the administrative law judge "dodged the Board's instruction to consider whether the evidence as a whole established that the large opacity constituted a chronic dust disease." Employer's Brief at 13. The Board directed the administrative law judge to determine "whether Dr. Dahhan diagnosed a chronic dust disease of the lung that yielded a Category A x-ray opacity," and to then determine "whether the x-ray evidence as a whole supports a finding of complicated pneumoconiosis at Section 718.304(a)." *Spence*, BRB No. 08-0159 BLA, slip op. at 8. The record reflects that the administrative law judge followed those instructions. Second Decision and Order on Remand at 5-6.

§718.304(c). Specifically, employer asserts that the administrative law judge erred in relying on the medical opinion of Dr. Forehand[6] to discredit the CT scan interpretations of Dr. Wheeler,[7] and erred in discrediting the medical opinion of Dr. Dahhan.[8] We disagree.

As the administrative law judge stated, we previously held that substantial evidence supports her finding that Dr. Forehand's opinion as to the absence of any evidence of tuberculosis undermines Dr. Wheeler's CT scan interpretations diagnosing tuberculosis, rather than complicated pneumoconiosis. *Spence*, BRB No. 08-0159 BLA, slip op. at 8; *see also Westmoreland Coal Co. v. Cox*, 602 F.3d 276, 287, --- BLR at --- (4th Cir. 2010). Further, the administrative law judge found Dr. Forehand's medical opinion to be well-reasoned because his x-ray diagnosis of complicated pneumoconiosis and his conclusion that claimant does not have tuberculosis are supported by the objective evidence of record. Decision and Order on Second Remand at 9. Because substantial evidence supports these findings, we affirm the administrative law judge's

[6] Dr. Forehand examined claimant on January 22, 2004, and reviewed the biopsy reports of Drs. Dubilier and Picklesimer, dated December 20, 1999 and November 14, 2002, respectively, and Dr. Antoun's January 28, 2004 CT scan report. Based on the biopsy and x-ray evidence, Dr. Forehand diagnosed complicated pneumoconiosis. Director's Exhibit 75. Dr. Forehand further stated that the CT scan findings were compatible with tuberculosis and complicated pneumoconiosis. He eliminated tuberculosis, however, based on claimant's exposure and treatment histories, his symptoms, a negative tuberculin test, lung and lymph node biopsies that revealed no microscopic presence of tuberculosis, cultures of lung tissue and lymph nodes that were negative for tuberculosis, and the absence of radiographic evidence of cavitary lung disease. Claimant's Exhibit 3.

[7] Dr. Wheeler interpreted computerized tomography (CT) scans, dated January 26, 2004 and July 2, 2004. Dr. Wheeler reported that the CT scans showed tuberculosis with conglomerate masses measuring 3 centimeters and 3.5 centimeters in the upper lobes. Employer's Exhibits 1, 2.

[8] Dr. Dahhan examined claimant on April 3, 2004, and reviewed Dr. Smith's reading of the April 3, 2004 x-ray, Dr. Forehand's January 28, 2004 medical report, the CT scan reports of Drs. Antoun, Wheeler, and Cappiello, interpreting the January 26, 2004 CT scan, and the pathology reports of Drs. Dubilier, Hansbarger, and Caffrey. Stating that the pathology reports "revealed no evidence of complicated pneumoconiosis" and that claimant "has no evidence of functional respiratory impairment and/or disability," Dr. Dahhan opined that claimant does not have complicated pneumoconiosis. Employer's Exhibit 7.

permissible credibility determination. *See Director, OWCP v. Rowe*, 710 F.2d 251, 255, 5 BLR 2-99, 2-103 (6th Cir. 1983). As employer raises no further challenges to the administrative law judge's weighing of the CT scan evidence, we affirm her finding that Dr. Cappiello's CT scan reading diagnosing complicated pneumoconiosis, Category A, outweighs Dr. Wheeler's contrary readings, and that the CT scan evidence, as a whole, supports a finding of complicated pneumoconiosis.

We additionally reject employer's assertion that the administrative law judge erred in discrediting Dr. Dahhan's opinion. The administrative law judge discounted Dr. Dahhan's opinion because Dr. Dahhan focused on biopsy evidence that was six years old, and did not discuss the more recent x-ray and CT scan evidence, which the administrative law judge found to be supportive of complicated pneumoconiosis. Contrary to employer's assertion, the administrative law judge permissibly discounted Dr. Dahhan's opinion for this reason.[9] *See Martin v. Ligon Preparation Co*., 400 F.3d 302, 305, 23 BLR 2-261, 2-283 (6th Cir. 2005); *Rowe*, 710 F.2d at 255, 5 BLR at 2-103.

As employer raises no further challenges to the administrative law judge's weighing of the x-ray, CT scan, and medical opinion evidence submitted on modification, we affirm the administrative law judge's finding that this evidence, as a whole, supports a finding of complicated pneumoconiosis. *See Martin*, 400 F.3d at 305, 23 BLR at 2-283; *Rowe*, 710 F.2d at 255, 5 BLR at 2-103. Further, in weighing all relevant evidence together, the administrative law judge permissibly assigned greater weight to the more recent evidence that was submitted on modification, than to the evidence previously submitted in this claim, "[b]ecause pneumoconiosis is progressive and irreversible." Second Decision and Order on Remand at 10; *see Peabody Coal Co. v. Odom*, 342 F.3d 486, 491, 22 BLR 2-612, 621 (6th Cir. 2003). We therefore affirm the administrative law judge's finding on the merits of entitlement that claimant "has met his burden to establish

[9] We additionally reject employer's assertion that the administrative law judge failed to consider Dr. Dahhan's reliance on claimant's lack of impairment on pulmonary function and blood gas studies. Employer's Brief at 16. The administrative law judge considered Dr. Dahhan's reliance on these objective studies, and accurately stated that "to be entitled to the statutory presumption of total disability due to pneumoconiosis, a claimant need not prove any pulmonary or respiratory disability through ventilatory and blood gas testing." Second Decision and Order on Remand at 9; *see* 30 U.S.C. §921(c)(3). Thus, the administrative law judge permissibly determined that Dr. Dahhan's reliance on the absence of a pulmonary impairment compromised the probative value of his opinion. *See Gray v. SLC Coal Co.*, 176 F.3d 382, 389, 21 BLR 2-615, 2-628-29 (6th Cir. 1999); *Director, OWCP v. Rowe*, 710 F.2d 251, 255, 5 BLR 2-99, 2-103 (6th Cir. 1983).

by a preponderance of the evidence that he has complicated coal workers' pneumoconiosis." Second Decision and Order on Remand at 10.

The Date from which Benefits are Payable

In considering the evidence that was submitted prior to claimant's modification request, the administrative law judge observed that the record before Judge Roketenetz contained ten interpretations of two x-rays, three pathology reports, and six medical opinions, and she summarized this evidence. Noting that the Board instructed her to reconsider Judge Roketenetz's previous decision for a mistake in fact and to explain her findings, the administrative law judge found that:

> [Claimant] has met his burden to establish by a preponderance of the evidence that he has complicated coal workers' pneumoconiosis. He has established a material change in condition since Judge Roketenetz's previous denial. I have found no mistake of fact in any of Judge Roketenetz's findings. But considering the evidence before Judge Roketenetz, in conjunction with the more recent evidence submitted on modification, it is clear that Judge Roketenetz's decision, which did not take into account the newer evidence, was mistaken in the ultimate fact of entitlement. Because pneumoconiosis is progressive and irreversible, it is logical that newly submitted evidence is sufficient to demonstrate the presence of complicated coal workers' pneumoconiosis.

Decision and Order on Second Remand at 10. The administrative law judge then awarded benefits as of October 1999, the month in which claimant filed this claim.[10]

Employer asserts that the administrative law judge's determination that benefits should commence as of October 1999, is inconsistent with her finding that the basis for modification was a change in condition, not a mistake of fact. Employer's Brief at 17-18. We agree that the administrative law judge has not adequately explained her finding. An administrative law judge's basis for granting modification, whether mistake of fact or change in conditions, affects the proper determination of the date from which benefits

[10] In support of her finding, the administrative law judge stated that the Board previously pointed out that the correct date for the commencement of benefits is October 1999. Second Decision and Order on Remand at 11 n.5. The record, however, reflects that, in its last decision, the Board noted only that claimant filed this claim in October 1999, not October 2001, as the administrative law judge had stated in her first Decision and Order on Remand. *Spence*, BRB No. 08-0159 slip op. at 3 n.3. The Board did not purport to identify the correct date for the commencement of benefits pursuant to 20 C.F.R. §725.503.

commence.[11] *See* 20 C.F.R. §725.503(d). In this case, the administrative law judge found: that the evidence submitted on modification established complicated pneumoconiosis and a "material change in condition" since Judge Roketenetz's denial of the duplicate claim; that there was no mistake of fact in any of Judge Roketenetz's findings; and that the newer evidence merited greater weight than the older evidence. It thus appears that the administrative law judge granted modification based on a change in conditions. However, in also finding that Judge Roketenetz was mistaken in the "ultimate fact of entitlement," and in awarding benefits as of the month in which this claim was filed, the administrative law judge appears to have granted modification based on a mistake of fact. *See* 20 C.F.R. §725.503(d)(1). Because the basis for granting modification is unclear from the administrative law judge's decision, we must vacate the administrative law judge's onset date finding, and remand this case for further consideration. *See* 20 C.F.R. §725.503(d). On remand, the administrative law judge must explain her specific basis for granting modification, and then apply the pertinent regulation to determine the date for the commencement of benefits. In so doing, the administrative law judge must address whether the record establishes the onset date of claimant's complicated pneumoconiosis, and explain her findings. *See Williams v. Director, OWCP*, 13 BLR 1-28, 1-30 (1989).

[11] The applicable regulation provides that, if a claim is awarded through modification based on a mistake in fact, benefits are payable beginning with the month of onset of total disability due to pneumoconiosis arising out of coal mine employment, or, if the evidence does not establish the month of onset, from the month in which claimant filed his claim. 20 C.F.R. §725.503(d)(1). While a similar method of determining the date from which benefits are payable applies when a claim is awarded through modification based on a change in conditions, the regulation contains the additional provision that, where the evidence establishes the month of onset of total disability due to pneumoconiosis, "no benefits shall be payable for any month prior to the effective date of the most recent denial," which, in this case, was the Board's Decision and Order dated October 20, 2003. 20 C.F.R. §725.503(d)(2). Further, if the evidence does not establish the month of onset, benefits are payable from the month in which the claimant requested modification. *Id*. Here, claimant requested modification on February 19, 2004. Director's Exhibit 77.

Accordingly, the administrative law judge's Second Decision and Order on Remand Awarding Benefits is affirmed in part and 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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JUDITH S. BOGGS
Administrative Appeals Judge