BRB No. 10-0256 BLA

WILLIAM B. BLANKENSHIP	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	DATE ISSUED: 12/10/2010
MYSTIC ENERGY, INCORPORATED	)	
	)	
and	)	
	)	
WEST VIRGINIA COAL WORKERS' PNEUMOCONIOSIS FUND	)	
	)	
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 Thomas M. Burke, Administrative Law Judge, United States Department of Labor.

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

Douglas A. Smoot and William P. Margelis (Jackson Kelly PLLC), Morgantown, West Virginia, for employer.

Before: DOLDER, Chief Administrative Appeals Judge, SMITH and BOGGS, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order Denying Benefits (08-BLA-5428) of Administrative Law Judge Thomas M. Burke rendered on a subsequent 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). This case is before the Board for the second time. It is now being considered pursuant to claimant's request for modification of the denial of his subsequent claim, which was filed on April 16, 2002.[1]

In the administrative law judge's initial Decision and Order, he credited claimant with twenty-two years of coal mine employment,[2] and found that employer's concession that claimant has pneumoconiosis established a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309(d). Considering the merits of the claim, the administrative law judge found that the evidence did not establish invocation of the irrebuttable presumption of total disability due to pneumoconiosis pursuant to 20 C.F.R. §718.304, or that claimant has a totally disabling respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(b)(2). Accordingly, the administrative law judge denied benefits.

Upon review of claimant's appeal, the Board affirmed the denial of benefits. *Blankenship v. Mystic Energy, Inc.*, BRB No. 06-0137 BLA (Sept. 21, 2006)(unpub.). Thereafter, claimant timely requested modification pursuant to 20 C.F.R. §725.310. Director's Exhibit 70. In support of this modification request, claimant submitted a reading of an October 2, 2006 x-ray by Dr. Miller, who reported that the x-ray revealed simple pneumoconiosis, along with a "2 x 3 cm mass" in the left lung that was "more suggestive of neoplasm than of progressive massive fibrosis secondary to coal workers[']pneumoconiosis." Director's Exhibit 70.

The administrative law judge found that the new evidence, considered along with that originally submitted, did not establish the existence of complicated pneumoconiosis pursuant to 20 C.F.R. §718.304. The administrative law judge further found that the medical evidence on modification continued to establish that claimant has "no pulmonary impairment," and thus, is not totally disabled pursuant to 20 C.F.R. §718.204(b)(2).[3]

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[1] After the issuance of the administrative law judge's Decision and Order, amendments to the Act, affecting claims filed after January 1, 2005 that were pending on or after March 23, 2010, were enacted. Because this claim was filed in 2002, those amendments do not affect this case.

[2] The Board will apply the law of the United States Court of Appeals for the Fourth Circuit, as claimant was last employed in the coal mining industry in West Virginia. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989) (*en banc*); Director's Exhibit 6.

[3] On modification, employer submitted an updated medical report from Dr. Zaldivar stating that claimant has no impairment. Employer's Exhibit 2. Upon review of

Decision and Order at 4. The administrative law judge therefore found that no mistake in a determination of fact or change of conditions was established pursuant to 20 C.F.R. §725.310. Accordingly, the administrative law judge denied benefits.

On appeal, claimant asserts that the administrative law judge erred in failing to find that the x-ray evidence established invocation of the irrebuttable presumption of total disability due to pneumoconiosis pursuant to 20 C.F.R. §718.304(a). Employer responds, urging affirmance of the denial of benefits. The Director, Office of Workers' Compensation Programs, has not submitted a brief in this appeal.[4]

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).

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. Failure to establish any one of these elements precludes entitlement. *Anderson v. Valley Camp of Utah, Inc*., 12 BLR 1-111, 1-112 (1989).

Modification of a denial of benefits may be granted if claimant establishes that there are changed conditions or if there was a mistake in a determination of fact in the earlier decision. 20 C.F.R. §725.310(a). In evaluating whether claimant has established a change in conditions, the administrative law judge must evaluate the new evidence to determine whether it establishes the element or elements of entitlement that defeated entitlement in the prior decision. *Nataloni v. Director, OWCP*, 17 BLR 1-82 (1993). Further, "any mistake of fact may be corrected [by the administrative law judge], including the ultimate issue of benefits eligibility." *Betty B. Coal Co. v. Director, OWCP* [*Stanley*], 194 F.3d 491, 497, 22 BLR 2-1, 2-11 (4th Cir. 1999).

Dr. Zaldivar's new report, the administrative law judge found that Dr. Zaldivar's "conclusion is right in line with his earlier opinion and those of Drs. Rasmussen and Mullins that found no pulmonary impairment in the subsequent claim." Decision and Order at 4.

[4] The administrative law judge's finding that claimant did not establish total disability pursuant to 20 C.F.R. §718.204(b)(2) is unchallenged on appeal. It is, therefore, affirmed. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

Claimant contends that the administrative law judge erred in finding that the x-ray evidence did not establish invocation of the irrebuttable presumption of total disability due to pneumoconiosis pursuant to Section 718.304(a).[5] Specifically, claimant argues that the administrative law judge "failed to properly evaluate the evidence but simply stated that the physicians who evaluated the chest x-ray did not think that the claimant suffered from 'complicated pneumoconiosis.'" Claimant's Brief at 6. We disagree.

Pursuant to Section 718.304(a), the administrative law judge considered the new x-ray evidence submitted on modification. Dr. Miller, a B reader, classified an x-ray taken on October 2, 2006, as "1/0," or positive, for simple pneumoconiosis, and he reported that no large opacities were present, by checking "0" in the "Large Opacities" block of the ILO x-ray classification form. Director's Exhibit 70. In a narrative report accompanying his ILO classification form, Dr. Miller described a "2 x 3 cm" mass in the left lung, which he stated was "more suggestive of neoplasm than of progressive massive fibrosis secondary to coal workers[']s pneumoconiosis." *Id*. Dr. Wiot, a B-reader and a Board-certified radiologist, reported that the October 2, 2006 x-ray showed no evidence of coal workers' pneumoconiosis. Director's Exhibit 73.

In evaluating the new x-ray readings, the administrative law judge accurately noted that neither physician diagnosed claimant with complicated pneumoconiosis by x-ray. Decision and Order at 4. We reject claimant's assertion that the administrative law judge failed to apply the proper standard in reviewing claimant's chest x-rays. Substantial evidence supports the administrative law judge's determination that the new x-ray evidence did not satisfy claimant's burden of establishing invocation of the irrebuttable presumption pursuant to Section 718.304(a), and thus, did not demonstrate a change in conditions. *See* 30 U.S.C. §921(c)(3)(A); 20 C.F.R. §§718.304(a); 725.310;

[5] Section 411(c)(3) of the Act, 30 U.S.C. §921(c)(3), implemented by 20 C.F.R. §718.304, 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. 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. *Lester v. Director, OWCP*, 993 F.2d 1143, 1145-46, 17 BLR 2-1143, 1145-46 (4th Cir. 1993); *Gollie v. Elkay Mining Corp*., 22 BLR 1-306, 1-311 (2003); *Melnick v. Consolidation Coal Co*., 16 BLR 1-31, 1-33-34 (1991)(*en banc*).

Lester v. Director, OWCP, 993 F.2d 1143, 1145-46, 17 BLR 2-1143, 1145-46 (4th Cir. 1993). Further, the administrative law judge properly considered the new x-ray evidence in conjunction with the evidence originally submitted, and reasonably found that it was "consistent with" his previous determination that the x-ray evidence did not establish invocation of the irrebuttable presumption. Decision and Order at 4. Thus, substantial evidence supports the administrative law judge's finding that no mistake of fact was demonstrated. As substantial evidence supports the administrative law judge's findings pursuant to Sections 718.304(a), 725.310, they are affirmed. Thus, we affirm the administrative law judge's determination that claimant did not establish a basis for modification pursuant to Section 725.310.

Accordingly, the administrative law judge's Decision and Order 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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JUDITH S. BOGGS
Administrative Appeals Judge