U.S. Department of Labor

Benefits Review Board
P.O. Box 37601
Washington, DC 20013-7601

BRB No. 14-0437 BLA

CARNIS H. DELP	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
EASTERN ASSOCIATED COAL CORPORATION	)	DATE ISSUED: 07/31/2015
	)	
Employer-Respondent	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order on Modification Denying Benefits of Administrative Law Judge Pamela J. Lakes, United States Department of Labor.

S. F. Raymond Smith, Crab Orchard, West Virginia, for claimant.

Paul E. Frampton (Bowles Rice LLP), Charleston, West Virginia, for employer.

Before: HALL, Chief Administrative Appeals Judge, BOGGS and ROLFE, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order on Modification Denying Benefits (2012-BLA-05078) of Administrative Law Judge Pamela J. Lakes on claimant's request for modification of the denial of a subsequent claim filed pursuant to the provisions of the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2012)(the Act). The history of this case is as follows. Claimant filed his first claim for benefits on April 7, 1987. Director's Exhibit 1. That claim was denied by the district director on September 16, 1987, because the evidence did not establish that claimant was totally disabled or totally disabled due to pneumoconiosis. *Id*. Claimant filed a second claim for

benefits on November 9, 1989. Director's Exhibit 2. The district director denied that claim on January 10, 1990, as claimant failed to establish total disability or total disability due to pneumoconiosis. *Id*. Claimant filed a third claim for benefits on September 12, 1994. That claim was denied by the district director on February 8, 1995, on the ground that claimant did not establish that he was totally disabled or totally disabled due to pneumoconiosis. *Id*.

Claimant filed a fourth claim for benefits on June 17, 2002, the claim at issue in this case. Director's Exhibit 5. In a Decision and Order issued on October 31, 2005, Administrative Law Judge William S. Colwell found that the newly submitted evidence was insufficient to establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(i)-(iv) or invocation of the irrebuttable presumption of total disability due to pneumoconiosis pursuant to 20 C.F.R. §718.304. 30 U.S.C. §921(c)(3); Director's Exhibit 52. Consequently, Judge Colwell found that claimant failed to demonstrate a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309 and denied benefits.[1] *Id*. Pursuant to claimant's appeal, the Board affirmed the denial of benefits in *Delp v. Eastern Assoc. Coal Corp.*, BRB No. 06-0191 BLA (Sept. 22, 2006)(unpub.). Director's Exhibit 59. On October 16, 2006, claimant filed a request for modification. Director's Exhibit 60. On May 27, 2009 Administrative Law Judge Jeffrey Tureck denied claimant's request for modification and denied benefits because claimant failed to show that his condition had changed by showing that he was now totally disabled or totally disabled by pneumoconiosis. The administrative law judge also found that claimant failed to show that a mistake in a determination of fact was made in the prior Decision and Order.[2] Director's Exhibit 88. Specifically, Judge Tureck found that claimant did

[1] When 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); *White v. New White Coal Co.*, 23 BLR 1-1, 1-3 (2004). The "applicable conditions of entitlement shall be limited to those conditions upon which the prior denial was based." 20 C.F.R. §725.309(d)(2). Claimant's most recent prior claim was denied because he did not prove that he was totally disabled. Accordingly, claimant was required to establish this element of entitlement in order to have his 2002 subsequent claim considered on the merits.

[2] Pursuant to Section 22 of the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. §922, which is incorporated into the Act by 30 U.S.C. §932(a), and implemented by 20 C.F.R. §725.310, in order to establish a basis for modification with respect to the denial of his subsequent claim, claimant must demonstrate that he is now totally disabled or that the previous Decision and Order contained a mistake in a determination of fact. In considering whether a change in conditions has been established, the administrative law judge is obligated to perform an independent

not suffer from complicated pneumoconiosis and, thus, could not benefit from the irrebuttable presumption of total disability due to pneumoconiosis at 20 C.F.R §718.304. The administrative law judge also found that claimant failed to establish total disability pursuant to Section 718.204(b), and, therefore, failed to establish entitlement under 20 C.F.R. Part 718. Claimant appealed. The Board, affirmed the denial in *Delp v. Eastern Associated Coal Corp*., BRB No. 09-0647 BLA (July 29, 2010) (unpub.).[3] Director's Exhibit 102. On December 17, 2010, claimant again filed for modification. *See* Decision and Order at 3 n.4.

Administrative Law Judge Pamela J. Lakes (the administrative law judge) credited claimant with thirty-five years of coal mine employment, based on employer's concession. The administrative law judge determined that the newly submitted evidence was insufficient to establish the presence of complicated pneumoconiosis and, therefore, was insufficient to establish invocation of the irrebuttable presumption of total disability due to pneumoconiosis under 20 C.F.R. §718.304. Decision and Order at 5, 12-13. The administrative law judge also found that the newly submitted evidence was insufficient to establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(i)-(iv).[4] *Id*. at 5, 14-15. Consequently, the administrative law judge found that claimant did not demonstrate a change in condition or that a mistake in a determination of fact was made in the prior decision denying benefits pursuant to 20 C.F.R. §725.310. Accordingly, the

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assessment of the newly submitted evidence, in conjunction with the previously submitted evidence, to determine if the weight of the new evidence is sufficient to establish at least one element of entitlement that defeated an award in the prior decision. *See Nataloni v. Director, OWCP*, 17 BLR 1-82 (1993); *Kovac v. BCNR Mining Corp.*, 14 BLR 1-156 (1990), *modified on recon.*, 16 BLR 1-71 (1992). The administrative law judge is authorized "to correct mistakes of fact, whether demonstrated by wholly new evidence, cumulative evidence, or merely further reflection on the evidence initially submitted." *O'Keeffe v. Aerojet-General Shipyards, Inc.*, 404 U.S. 254, 256 (1971).

[3] The Board also held that Section 1556 of Public Law No. 111-148, amending the Black Lung Benefits Act (the Act), was not applicable to this case based on the filing date of the claim. *Delp v. Eastern Associated Coal Corp.*, BRB No. 09-0647 BLA (Mar. 30, 2010)(unpub. Order); Decision and Order at 1.

[4] To establish entitlement to benefits in a living miner's claim, claimant must demonstrate, by a preponderance of the evidence, that he has pneumoconiosis arising out of coal mine employment, that he is totally disabled and that his disability is due to pneumoconiosis. 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 a finding of entitlement. *Anderson v. Valley Camp of Utah, Inc*., 12 BLR 1-111, 1-112 (1989); *Trent v. Director, OWCP*, 11 BLR 1-26, 1-27 (1987).

administrative law judge denied claimant's request for modification and again denied benefits.

On appeal, claimant contends that the administrative law judge erred in finding 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. Employer responds to the appeal, urging affirmance of the administrative law judge's denial of benefits. The Director, Office of Workers' Compensation Programs, has declined to respond to claimant's appeal.[5]

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.[6] 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, creates an irrebuttable presumption that the miner is totally disabled due to pneumoconiosis if (A) an x-ray of the miner's lungs shows at least one opacity greater than one centimeter in diameter; (B) a biopsy reveals "massive lesions" in the lungs; or (C) a diagnosis by other means reveals a result equivalent to (A) or (B). *See E. Assoc. Coal Co.* [*Scarbro*] *v. Director, OWCP*, 220 F.3d 250, 22 BLR 2-93 (4th Cir. 2000); *Double B Mining, Inc. v. Blankenship*, 177 F.3d 240, 243, 22 BLR 2-554, 2-560 (4th Cir. 1999). The Section 411(c)(3) irrebuttable presumption was created, however, "*not* because [claimant] has provided a single piece of relevant evidence, but because he has a 'chronic dust disease of the lung,' commonly known as complicated pneumoconiosis. To make such a determination, [the administrative law judge] necessarily must look at all of the relevant evidence presented." *Lester v. Director, OWCP*, 993 F.2d 1143, 1145, 17 BLR 2-114, 2-117 (4th Cir. 1993).

Pursuant to 20 C.F.R. §718.304, the administrative law judge found that the newly submitted evidence consisted of readings of conventional and digital x-rays, CT scans,

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[5] We affirm, as unchallenged on appeal, the administrative law judge's finding that claimant thus failed to establish that a mistake in a determination of fact was made in the previous decision. Decision and Order at 7, 14-15. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

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

pathology evidence, and treatment records. Decision and Order at 8-11. Considering the new x-ray evidence, the administrative law judge found that Dr. Wheeler's readings of digital x-rays taken on July 20, 2007 and September 5, 2012 were both negative for large opacities consistent with pneumoconiosis, and that none of the radiological reports contained in the medical records mentioned simple or complicated pneumoconiosis or progressive massive fibrosis. *Id*. at 9. She also considered Dr. Mezheritskiy's x-ray of July 21, 2010, taken on a portable x-ray machine, noting that the doctor specified "no radiographic evidence of active disease," and noted biapical scarring and pleural thickening "likely representing old tuberculosis." *Id*.; Director's Exhibit 107 at 6. Next, the administrative law judge reviewed an x-ray, "taken sometime between July 21, 2010 and July 25, 2010," and read by Dr. Barnes, as "an unspecified type of x-ray appearing in Dr. Balaji's records" which "identified small recticulonodular densities," a 6mm nodule and a 1.7cm nodule with a lateral 10x5mm nodule. *Id*. at 9 n.10, 12 n.12; Director's Exhibits 102, 107. Based on the foregoing, the administrative law judge determined that claimant failed to establish the existence of complicated pneumoconiosis based upon the preponderance of the x-ray evidence at Section 718.304(a).[7]

Claimant does not contest the accuracy of the administrative law judge's findings concerning the x-ray evidence. Although Dr. Barnes' July 2010 x-ray contained an opacity measuring greater than one centimeter, the administrative law judge found that, because it was not classified according to the ILO system and contained no discussion of the etiology of the lesion, it was insufficient to establish complicated pneumoconiosis. *See* 20 C.F.R. §§718.102(b), 718.304(a). Claimant does not challenge the administrative law judge's consideration of Dr. Barnes' July 2010 x-ray reading, or demonstrate how the x-ray evidence otherwise satisfies the regulatory requirements at Section 718.304(a). Claimant's Brief at 6 (unpaginated). Consequently, we affirm the administrative law judge's finding that the existence of complicated pneumoconiosis is not established by x-ray evidence at Section 718.304(a). *See Sarf v. Director, OWCP*, 10 BLR 1-119, 1-120-21; *Fish v. Director, OWCP*, 6 BLR 1-107 (1983).

Next, the administrative law judge found that none of the three pathology reports dated March 19, 2003, June 7, 2011, and August 31, 2012, found complicated pneumoconiosis or large opacities consistent with pneumoconiosis. Decision and Order at 10; 20 C.F.R. §718.304(b); Employer's Exhibits 8-10. Similarly, the administrative law judge found that, while the pathology report of July 6, 2013 found simple pneumoconiosis, it did not identify massive lesions that would correspond with opacities

[7] Moreover, the administrative law judge found no error in the determinations reached by Administrative Law Judge William S. Cowell and Administrative Law Judge Jeffrey Tureck, and affirmed by the Board, that the previously submitted x-ray evidence dating from 2002-2004 failed to establish a basis for modification. Decision and Order at 8-9; *Delp*, BRB No. 06-0191 BLA, slip op. at 2-3.

consistent with complicated pneumoconiosis. Employer's Exhibit 2; Decision and Order at 10. Contrary to claimant's assertion, the presence of "dense black pigment deposition" does not constitute a diagnosis of complicated pneumoconiosis under 20 C.F.R. §718.304(b).[8] *See Perry v. Myru Coals, Inc.*, 469 F.3d 360, 365, 23 BLR 2-374, 2-384 (4th Cir. 2006); *Blankenship*, 177 F.3d at 243, 22 BLR at 2-560; Claimant's Brief at 5. Accordingly, the administrative law judge's finding that the pathology evidence fails to establish complicated pneumoconiosis at Section 718.304(b) is affirmed.

Turning to Section 718.304(c), the administrative law judge considered the newly submitted CT scan evidence, consisting of four CT scans, dated February 16, 2010, July 24, 2010, July 10, 2012, and August 29, 2012, all read by Dr. Wheeler as containing opacities ranging from 1.1cm to 4.7cm representing conglomerate granulomatous disease, "most likely histoplasmosis." Decision and Order at 11-12; Employer's Exhibits 4, 6-8. She considered Dr. Wheeler's opinion that while some of the smaller nodules could be coal workers' pneumoconiosis (CWP), the larger masses are not complicated pneumoconiosis. *Id.* Because claimant did not provide any positive readings for complicated pneumoconiosis of these CT scans, the administrative law judge found that they failed to establish the existence of complicated pneumoconiosis.

The administrative law judge also considered two additional CT scans taken on, or about, July 24, 2010, and on May 26, 2011, respectively. In the scan taken July 24, 2010, Dr. Barnes identified a 1.7cm nodule, but provided "no discussion of its etiology." Director's Exhibit 2. In the second scan, taken May 26, 2011, Dr. Khursheed identified bilateral pulmonary nodules, mild subpleural fibrosis, and calcified lymph nodes up to 13mm compatible with prior granulomatous infection. Employer's Exhibit 10. The

[8] Claimant apparently relies on Dr. Huberman's pathology report of August 31, 2012, and Dr. Pandya's report of March 19, 2003 in support of his argument that complicated pneumoconiosis was established. Employer's Exhibits 8, 9. The administrative law judge summarized that: "[B]ased upon tissue from the left upper lobe (measuring up to 1cm. at its greatest length and 0.1cm. at its greatest diameter), Dr. Huberman noted the presence of extensively fibrotic tissue with abundant dense black pigment deposition but no diagnostic malignancy." Additionally, the administrative law judge considered Dr. Pandya's finding of "a focal increase in fibrous tissue, focal mild chronic inflammation, a large quantity of anthracotic pigment, a focal area of calcification, and no evidence of malignancy." *Id.*; Decision and Order at 10.

Moreover, Dr. Pandya's finding of actual specimens measuring 0.3cm x 0.1cm, and Dr. Huberman's finding of fibrotic tissue measuring *up to 1cm* in greatest length by less than 0.1cm in greatest diameter, fail to satisfy the regulatory standard, which requires opacities or lesions *greater than* 1 cm to qualify as complicated pneumoconiosis. 20 C.F.R. §718.304.

administrative law judge concluded that these CT scans failed to support a finding of complicated pneumoconiosis.

Similarly, the administrative law judge found that the newly submitted medical records, dating from 2010-2013, contained no diagnoses of complicated pneumoconiosis or progressive massive fibrosis. Specifically, she noted that, "not one physician diagnosed claimant with complicated pneumoconiosis," and that, while "there are some radiological reports in the new medical records in addition to the CT scans, none of them discuss pneumoconiosis" and thus, they "do not support a finding of complicated pneumoconiosis." Decision and Order at 13. The administrative law judge concluded, therefore, that claimant failed to establish the existence of complicated pneumoconiosis based on the preponderance of the "other medical evidence of record." 20 C.F.R §718.304(c); *Id.* at 12-13.

Claimant contends:

> While employer's physicians have offered up a number of speculations as to the cause of [the greater than 1 cm opacity.][C]laimant would invite the Board's attention to the fact that there has been no independent evidence which would establish that [claimant] had indeed suffered from histoplasmosis or tuberculosis or that either condition produced any radiographic changes. The radiological and biopsy evidence taken over a period of time also undercuts the speculation by the employer's physicians that the opacity in [claimant's] lung is cancer since it has stayed relative[ly] consistent in size over the previous [ten] years.

Claimant's Brief at 6 (unpaginated).

We reject claimant's assertion, however, because the record does not contain a preponderance of evidence that the opacities identified are those of complicated pneumoconiosis. *See Scarbro*, 220 F.3d at 256, 22 BLR at 2-100; *Lester*, 993 F.2d at 1145, 17 BLR at 2-117.[9] Accordingly, we affirm the administrative law judge's finding that the existence of complicated pneumoconiosis is not established at Section 718.304(c).

[9] It is claimant's burden to show the existence of complicated pneumoconiosis and there is no presumption that any opacities found constitute coal workers' pneumoconiosis. Consequently, claimant's assertion concerning the non-existence of cancer is unavailing, since there is no affirmative medical evidence that the opacities in this case alternatively constitute complicated coal workers' pneumoconiosis.

Based on the foregoing, we affirm the administrative law judge's determination that claimant failed to prove that he has complicated pneumoconiosis pursuant to 20 C.F.R. §718.304(a)-(c); Decision and Order at 9-14. Consequently, we also affirm the administrative law judge's finding that claimant did not establish a change in an applicable condition of entitlement under 20 C.F.R. §725.309(d) and did not establish a basis for modification under 20 C.F.R. §725.310.

Accordingly, the administrative law judge's Decision and Order on Modification Denying Benefits is affirmed.

SO ORDERED.

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BETTY JEAN HALL, Chief
Administrative Appeals Judge

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JUDITH S. BOGGS
Administrative Appeals Judge

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JONATHAN ROLFE
Administrative Appeals Judge