BRB No. 04-0589 BLA

CHARLES EDWARD COOPER	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
WESTMORELAND COAL COMPANY	)	
	)	DATE ISSUED: 03/24/2005
Employer-Petitioner	)	
	)	
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 – Awarding Benefits of Richard E. Huddleston, Administrative Law Judge, United States Department of Labor.

James M. Phemister (Washington and Lee University Legal Practice Clinic), Lexington, Virginia.

Dorothea J. Clark (Jackson & Kelly PLLC), Morgantown, West Virginia, for employer.

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

PER CURIAM:

Employer appeals the Decision and Order on Remand - Awarding Benefits (1999-BLA-1032) of Administrative Law Judge Richard E. Huddleston with respect to a claim filed pursuant to the provisions of Title IV of the Federal Coal Mine Health and Safety Act of 1969, as amended, 30 U.S.C. §901 *et seq.* (the Act). This is the second time that

the Board has addressed an appeal in this case.[1] In its prior Decision and Order, the Board vacated the administrative law judge's finding that claimant established a mistake in a determination of fact and a material change in conditions pursuant to 20 C.F.R. §§725.309 and 725.310 (2000) with respect to the denial of claimant's duplicate claim and remanded the case to the administrative law judge for reconsideration of the x-ray evidence, a reweighing of the evidence of record as a whole under 20 C.F.R. §718.304, and reconsideration of the date from which claimant is entitled to benefits. *Cooper v. Westmoreland Coal Co.*, BRB No. 02-0709 BLA (July 31, 2003)(unpub.).

On remand, the administrative law judge found that claimant established a mistake of fact in the prior denial of a duplicate claim inasmuch as the x-ray evidence established the existence of complicated pneumoconiosis pursuant to Section 718.304(a). The administrative law judge further found that the evidence of record as a whole was sufficient to invoke the irrebuttable presumption of total disability due to pneumoconiosis set forth in Section 718.304. Accordingly, benefits were awarded effective September 1, 1992. Employer argues on appeal that the administrative law judge did not properly weigh either the x-ray evidence or the CT scan evidence under Section 718.304. Claimant has responded and urges affirmance of the award of benefits. The Director, Office of Workers' Compensation Programs, has indicated that he will not file a response to employer's appeal.

The Board's scope of review is defined by statute. If the administrative law judge's findings of fact and conclusions of law are supported by substantial evidence, are

[1] Claimant, a living miner, filed his initial claim for benefits on April 1, 1985. Administrative Law Judge Clement J. Kichuk denied benefits in a Decision and Order issued on September 12, 1989, on the ground that claimant failed to prove that he is totally disabled due to pneumoconiosis. The Board affirmed the denial of benefits on March 28, 1991. Director's Exhibit 33. Claimant filed a second application for benefits on July 18, 1996. Director's Exhibit 1. Administrative Law Judge Stuart A. Levin denied benefits in a Decision and Order dated May 28, 1998. Director's Exhibit 47. After withdrawing his appeal of Judge Levin's Decision and Order, claimant submitted additional evidence and requested modification of the denial of benefits in correspondence dated September 28, 1998. Director's Exhibit 55. Administrative Law Judge Richard E. Huddleston (the administrative law judge) issued a Decision and Order in which he determined that claimant established a mistake in a determination of fact pursuant to 20 C.F.R. §725.310 (2000) and a material change in conditions pursuant to 20 C.F.R. §725.309 (2000). The administrative law judge further found that claimant established invocation of the irrebuttable presumption of total disability due to pneumoconiosis set forth in 20 C.F.R. §718.304. Accordingly, benefits were awarded and employer's appeal followed.

rational, and are consistent with applicable law, they are binding upon this Board and may not be disturbed. 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).

Employer initially contends that the administrative law judge erred in discrediting the readings in which Drs. Wheeler and Gaziano indicated that claimant's x-rays show that he has or had tuberculosis (TB), rather than a coal dust related disease, as the administrative law judge required them to identify the source of the large opacities seen on the x-rays rather than accepting their observations that the opacities are not related to coal dust exposure. Employer cites the decision of the United States Court of Appeal for the Fourth Circuit in *Lester v. Director, OWCP*, 993 F.2d 1143, 17 BLR 2-114 (4th Cir. 1993), as standing for the proposition that the claimant bears the burden of establishing that the large opacities are caused by dust exposure in coal mine employment rather than the employer being required to prove that the opacities are due to a specific non-coal dust related source.[2]

Employer's allegation of error is without merit. Although employer has correctly identified the holding in *Lester*, in order to resolve the conflicting x-ray interpretations regarding the presence of complicated pneumoconiosis, the administrative law judge must assess the probative value of the x-ray readings in their entirety, rather than accepting them at face value. *Eastern Associated Coal Corp. v. Director, OWCP [Scarbro]*, 220 F.3d 250, 22 BLR 2-93 (4th Cir. 2000); *Lester*, 993 F.2d 1143, 17 BLR 2-114; *see also Melnick v. Consolidation Coal Co.*, 16 BLR 1-31 (1991)(*en banc*). The administrative law judge acted within his discretion, therefore, in finding that Dr. Wheeler's and Dr. Gaziano's equivocal identification of TB as the disease process that accounts for the markings that other physicians have identified as complicated pneumoconiosis diminishes their credibility. Decision and Order on Remand at 9; Director's Exhibits 13, 27. Moreover, the administrative law judge rationally determined that the probative value of their diagnoses of TB was also undercut by the opinions in which Drs. Cohen and Koenig explicitly discussed why TB, either healed or active, is not present. *Id.*; Claimant's Exhibits 4, 5; *Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 21 BLR 2-323 (4th Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 21 BLR 2-269 (4th Cir. 1997).

Employer also argues that the administrative law judge committed the same error with respect to the x-ray readings offered by Drs. Scott, Kim, Fino, Shipley, Spitz and

[2] This case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit, as claimant's last year of coal mine employment occurred in the State of West Virginia. Director's Exhibits 2, 33; *Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*).

Dahhan. Employer further alleges that the administrative law judge acted improperly in discrediting these interpretations on the ground that these physicians did not detect the presence of simple pneumoconiosis. In our prior Decision and Order, we held that the administrative law judge acted within his discretion in giving less weight to x-ray readings that were not positive for at least simple pneumoconiosis. *Cooper v. Westmoreland Coal Co.*, BRB No. 02-0709 BLA (July 31, 2003)(unpub.), slip op. at 7. Because employer has not advanced a compelling argument for altering this holding, it is now the law of the case and we decline to disturb it. *Brinkley v. Peabody Coal Co.*, 14 BLR 1-147 (1990); *Bridges v. Director, OWCP*, 6 BLR 1-988 (1984).

We affirm, therefore, the administrative law judge's finding that the x-ray evidence of record is sufficient to establish the existence of complicated pneumoconiosis pursuant to Section 718.304(a), as it is rational and supported by substantial evidence. The administrative law judge provided valid reasons for discrediting the interpretations submitted by Drs. Wheeler, Gaziano, Kim, Wiot, Shipley, Spitz, Fino, Dahhan, and Scott and acted within his discretion in determining that Dr. Wiot's positive reading for large opacities was entitled to great weight based upon Dr. Wiot's qualifications as a B reader, Board-certified radiologist, and participant in the development of the B reader program. *Hicks*, 138 F.3d at 533, 21 BLR at 2-335.

Regarding the administrative law judge's weighing of the CT scan evidence, employer contends that the administrative law judge erred in giving more weight to Dr. Alexander's diagnosis of complicated pneumoconiosis because he is Board-certified in Nuclear Medicine in addition to being a B reader and a Board-certified radiologist. We disagree. In our prior Decision and Order, we held that the administrative law judge's determination that the CT scan evidence was sufficient to invoke the irrebuttable presumption pursuant to Section 718.304(c) was supported by substantial evidence in the form of the opinions of Drs. Patel, Cohen, and Alexander. *Cooper v. Westmoreland Coal Co.*, BRB No. 02-0709 BLA (July 31, 2003)(unpub.), slip op. at 12. In its present appeal, employer essentially requests a reweighing of the CT scan evidence; a function that the Board is not empowered to perform. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1989); *Worley v. Blue Diamond Coal Co.*, 12 BLR 1-20 (1988). We decline, therefore, to alter our prior holding affirming the administrative law judge's finding under Section 718.304(c).

With respect to the administrative law judge's finding that the evidence of record as a whole established the existence of complicated pneumoconiosis, employer contends that the administrative law judge did not weigh the conflicting evidence as required and did not explain why he gave more weight to the CT scan evidence. Employer's allegations of error are without merit. In the present case, the administrative law judge rationally found that the x-ray evidence in which complicated pneumoconiosis was diagnosed outweighed the contrary probative evidence. In addition, the administrative

law judge acted within his discretion in finding that the preponderance of CT scan evidence was also positive for complicated pneumoconiosis. Thus, the administrative law judge permissibly determined that the evidence of record as a whole supported invocation of the irrebuttable presumption of total disability due to pneumoconiosis under Section 718.304(a), a material change in conditions pursuant to Section 725.309, and an award of benefits.[3] Decision and Order on Remand at 16-17; *Scarbro*, 220 F.3d 250, 22 BLR 2-93.

Accordingly, the administrative law judge's Decision and Order on Remand - Awarding Benefits is affirmed.

SO ORDERED.

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NANCY S. DOLDER, Chief
Administrative Appeals Judge

_____
ROY P. SMITH
Administrative Appeals Judge

_____
BETTY JEAN HALL
Administrative Appeals Judge

[3] We affirm the administrative law judge's finding that the date from which claimant is entitled to benefits is September 1, 1992, as this finding has not been challenged on appeal. Decision and Order on Remand at 21; *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).