BRB No. 12-0018 BLA

CLARENCE G. SYKES	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
TRIPLE E COAL CORPORATION/KNOX CREEK COAL CORPORATION	)	
	)	
	)	DATE ISSUED: 10/02/2012
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 of Linda S. Chapman, Administrative Law Judge, United States Department of Labor.

Ronald E. Gilbertson (Husch Blackwell LLP), Washington, D.C., for employer.

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

PER CURIAM:

Employer appeals the Decision and Order (10-BLA-5016) of Administrative Law Judge Linda S. Chapman awarding benefits on a 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 involves a subsequent claim filed on October 6, 2008.[1]

[1] Claimant filed three previous claims. Claimant's first claim, filed on January 22, 1981, was denied as abandoned. Director's Exhibit 1. The district director denied claimant's second claim, filed on October 16, 1992, because claimant failed to establish that he was totally disabled due to pneumoconiosis. Director's Exhibit 2. Claimant's

After crediting claimant with 22.76 years of coal mine employment,[2] the administrative law judge found that the new evidence established the existence of complicated pneumoconiosis pursuant to 20 C.F.R. §718.304, thereby establishing invocation of the irrebuttable presumption of total disability due to pneumoconiosis at 20 C.F.R. §718.304. The administrative law judge, therefore, found that claimant established that one of the applicable conditions of entitlement had changed since the date upon which the denial of claimant's prior claim became final. 20 C.F.R. §725.309. Consequently, the administrative law judge considered claimant's 2008 claim on the merits.

The administrative law judge also found that the evidence, as a whole, established invocation of the irrebuttable presumption pursuant to 20 C.F.R. §718.304. Accordingly, the administrative law judge awarded benefits.

On appeal, employer contends that the administrative law judge erred in finding that the evidence established the existence of complicated pneumoconiosis. Neither claimant nor the Director, Office of Workers' Compensation Programs, has filed a response brief.

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).

In order to establish entitlement to benefits under 20 C.F.R. Part 718 in a miner's claim, a claimant must establish the existence of pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, and that the pneumoconiosis is totally disabling. 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure to establish any one of these elements precludes entitlement. *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986) (en banc).

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third claim, filed on February 23, 1995, was also denied based upon his failure to establish that he was totally disabled due to pneumoconiosis. Director's Exhibit 3.

[2] Claimant's last coal mine employment was in Virginia. Director's Exhibit 6. Accordingly, the Board will apply the law 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).

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); *White v. New White Coal Co.*, 23 BLR 1-1, 1-3 (2004). The "applicable conditions of entitlement" are "those conditions upon which the prior denial was based." 20 C.F.R. §725.309(d)(2). Claimant's prior claim was denied because he did not establish that he was totally disabled due to pneumoconiosis. Director's Exhibit 3. Consequently, to obtain review of the merits of his subsequent claim, claimant had to submit new evidence establishing that he was totally disabled due to pneumoconiosis. 20 C.F.R. §725.309(d)(2), (3).

Complicated Pneumoconiosis

Employer argues that the administrative law judge erred in finding that claimant established the existence of complicated pneumoconiosis, and therefore, established invocation of the irrebuttable presumption of total disability due to pneumoconiosis set out at 20 C.F.R. §718.304. Under Section 411(c)(3) of the Act, 30 U.S.C. §921(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 the miner is suffering from a chronic dust disease of the lung which (A) when diagnosed by x-ray, yields an opacity greater than one centimeter in diameter that would be 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, would be a condition that could reasonably be expected to reveal a result equivalent to (A) or (B). *See* 20 C.F.R. §718.304.

The United States Court of Appeals for the Fourth Circuit has held that, "[b]ecause prong (A) sets out an entirely objective scientific standard" for diagnosing complicated pneumoconiosis, that is, an x-ray opacity greater than one centimeter in diameter, the administrative law judge must determine whether a condition that is diagnosed by biopsy or autopsy under prong (B) or by other means under prong (C) would show as a greater-than-one-centimeter opacity if it were seen on a chest x-ray. *Eastern Associated Coal Corp. v. Director, OWCP* [*Scarbro*], 220 F.3d 250, 255, 22 BLR 2-93, 2-100 (4th Cir. 2000); *Double B Mining, Inc. v. Blankenship*, 177 F.3d 240, 243, 22 BLR 2-554, 2-561-62 (4th Cir. 1999). 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).

Section 718.304(a)

Relevant to 20 C.F.R. §718.304(a), the administrative law judge considered ten interpretations of five new x-rays dated April 2, 2007, November 20, 2008, March 26, 2009, November 16, 2009, and April 13, 2010. Each of these x-rays was interpreted as both positive and negative for complicated pneumoconiosis.[3] Director's Exhibits 13, 14; Claimant's Exhibits 1, 2, 7, 8; Employer's Exhibits 9, 12-14. Because the administrative law judge found that the x-ray evidence was "in equipoise," he found that the x-ray evidence, standing alone, was not sufficient to establish the presence, or absence, of complicated pneumoconiosis at 20 C.F.R. §718.304(a). Decision and Order at 13.

Section 718.204(c)

The record also contains a range of other diagnostic evidence under Section 718.304(c), including new digital chest x-ray readings, new CT scan readings, and new medical opinion evidence.[4] The record contains two interpretations of a digital x-ray taken on July 2, 2009. While Dr. Fino, a B reader, interpreted this x-ray as negative for complicated pneumoconiosis, Employer's Exhibit 1, Dr. Miller, a B Reader and Board-certified radiologist, interpreted this x-ray as positive for the disease. Employer's Exhibit 6. The administrative law judge found that the interpretations of the July 2, 2009 digital x-ray were in equipoise. Decision and Order at 13.

The record also contains three CT scans taken on February 26, 2008, March 10, 2009, and March 11, 2010. Dr. Scott interpreted the February 26, 2008 CT scan as revealing a 4 cm by 2 cm mass in the right upper lung and a 1.5 cm mass in the left lung. Employer's Exhibit 2. However, due to the minimal background of small opacities, Dr. Scott indicated that healed tuberculosis or histoplasmosis was a more likely diagnosis than pneumoconiosis. *Id.*

[3] While Dr. Ahmed interpreted the April 2, 2007 and March 26, 2009 x-rays as positive for complicated pneumoconiosis, Claimant's Exhibits 1, 8, Dr. Wheeler interpreted these x-rays as negative for the disease. Employer's Exhibits 9, 14. While Dr. DePonte, Dr. Miller, and Dr. Alexander interpreted the November 20, 2008, November 16, 2009, and April 13, 2010 x-rays, respectively, as positive for complicated pneumoconiosis, Director's Exhibit 13; Claimant's Exhibits 2, 7, Dr. Scott interpreted each of the x-rays as negative for the disease. Director's Exhibit 14; Employer's Exhibits 12, 14. All of above-referenced physicians are dually qualified as B readers and Board-certified radiologists.

[4] Because there is no biopsy evidence in the record, the administrative law judge noted that there was no evidence to consider pursuant to 20 C.F.R. §718.304(b).

Dr. Kaufman interpreted the March 10, 2009 CT scan as revealing multiple nodular and confluent masses in the apices associated with fibrosis. Claimant's Exhibit 5. Dr. Kaufman indicated that his "difficult diagnosis" would include pneumoconiosis or fungal disease. *Id.* Dr. Scott also reviewed the March 10, 2009 CT scan, noting the presence of a 4 cm by 2 cm mass in the right upper lung, a 2.0 cm mass in the left lung, and a few 1.0 cm nodules. Employer's Exhibit 2. Dr. Scott found "[n]o significant background of small opacities to support a diagnosis of pneumoconiosis," and noted that the changes were "probably healed [tuberculosis] or histoplasmosis." *Id.*

Dr. Payne interpreted the March 11, 2010 CT scan as revealing "innumerable bilateral predominantly upper lung nodules." Claimant's Exhibit 5. Dr. Wheeler also interpreted the March 11, 2010 CT scan, noting the presence of "lobulated and irregular 2-5 cm. masses in [the] upper lobes . . . compatible with conglomerate granulomatous disease." Employer's Exhibit 6. Dr. Wheeler indicated that histoplasmosis was a more likely diagnosis than tuberculosis or mycobacterium avium complex. *Id.* Dr. Wheeler found that the masses in the upper lobes were not large opacities of pneumoconiosis because the background nodules were of too low a profusion. *Id.*

The record also contains the medical opinions of Drs. Agarwal, Fino, and Dahhan. Dr. Agarwal diagnosed pneumoconiosis with progressive massive fibrosis. Director's Exhibit 13. Although Drs. Fino and Dahhan opined that claimant suffers from simple pneumoconiosis, they opined that claimant does not suffer from complicated pneumoconiosis. Employer's Exhibits 1, 4, 10, 11, 15.

The Administrative Law Judge's Finding

In analyzing whether claimant established the existence of complicated pneumoconiosis, the administrative law judge first stated that the "evidence in [this] claim, when considered in isolation under independent subsections at 20 C.F.R. §718.304(a) and (c), is not sufficient to establish the presence, *or absence*, of complicated pneumoconiosis." Decision and Order at 13. However, the administrative law judge noted that, in accordance with the guidelines set forth by the Fourth Circuit in *Westmoreland Coal Co. v. Cox*, 602 F.3d 276, 24 BLR 2-269 (4th Cir. 2010), she was required to consider whether the 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, and whether these opacities are due to pneumoconiosis. Decision and Order at 12-13.

The administrative law judge found that the "overwhelming preponderance of the x-ray and CT scan evidence establishe[d] that [claimant] has masses in his lungs that

appear as larger than one centimeter on x-ray."[5] Decision and Order at 14. Therefore, the administrative law judge focused her analysis on the etiology of the masses or large opacities identified on the x-rays and CT scans.

In weighing the conflicting x-ray readings, the administrative law judge discussed the qualifications of Drs. Ahmed, DePonte, Miller, and Alexander, and found that they provided credible x-ray readings of complicated pneumoconiosis. Decision and Order at 14. The administrative law judge also found that, while Drs. Wheeler and Scott possess equivalent credentials, their opinions, that claimant's opacities or masses, exceeding one centimeter in diameter, were due to conditions such as granulomatous disease, mycobacterium avium complex, histoplasmosis, tuberculosis, fungal infection, or sarcoidosis, were speculative and entitled to little weight. *Id*. The administrative law judge further found that neither Dr. Scott nor Dr. Wheeler "explained why a finding of granulomatous disease would necessarily rule out a diagnosis of pneumoconiosis, or in other words, why these conditions could not co-exist." *Id.* at 14-15. The administrative law judge also accorded less weight to the opinions of Drs. Scott and Wheeler because they did not interpret claimant's x-rays and CT scans as positive for simple pneumoconiosis, a finding that the administrative law judge noted was contrary to the weight of the evidence. *Id.* at 15.

The administrative law judge discredited the opinions of Drs. Dahhan and Fino, that claimant does not suffer from complicated pneumoconiosis, because they based their opinions, in part, on the absence of a pulmonary impairment. Decision and Order at 16. The administrative law judge, therefore, concluded that:

> Weighing all the . . . medical evidence as a whole, I find that the evidence submitted in connection with the instant claim establishes that [claimant] has a mass in his lungs that appears larger than one centimeter in diameter

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[5] The administrative law judge noted that:

> Dr. Wheeler and Dr. Scott have both described a 2 cm. scar, mass, or "possible" nodule in [claimant's] left lung. On [claimant's] CT scans, which Dr. Wheeler described as the most accurate modality in diagnostic radiology, both Dr. Wheeler and Dr. Scott described large masses in [claimant's] chest. Dr. Kaufman and Dr. Payne, the radiologists who read the CT scans at [claimant's] treating physician's request, reported multiple nodular and confluent masses in the apices associated with fibrosis (Dr. Kaufman) and innumerable bilaterally predominantly upper lung nodules, with bilateral zones of masslike coalescence (Dr. Payne).

Decision and Order at 14.

> on an x-ray. The evidence offered by [e]mployer does not show that the mass does not exist; indeed all of the x-ray and CT scan evidence confirms the presence of large masses in [claimant's] lungs. Nor does the medical evidence show that this mass is due to a process other than pneumoconiosis; the opinions submitted by the [e]mployer's experts are equivocal and speculative, and do not establish that the opacities are due to a process other than pneumoconiosis. Accordingly, I find that [claimant] has met his burden to successfully establish his entitlement to the irrebuttable presumption of total disability due to pneumoconiosis under [S]ection 718.304.

Decision and Order at 19.

Discussion

Employer contends that the administrative law judge did not apply the burden of proof to claimant to establish complicated pneumoconiosis, and that she presumed that the large masses seen on claimant's x-rays and CT scans were due to pneumoconiosis. We disagree. The administrative law judge permissibly credited the x-ray interpretations of Drs. Ahmed, DePonte, Miller, and Alexander, who specifically attributed the masses to pneumoconiosis, finding that their readings were supported by interpretations of a digital x-ray and CT scans.[6] *See 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).

[6] Employer contends that the administrative law judge erred in finding that the CT scans confirmed the presence of large masses without first making an equivalency finding that masses identified on the CT scans would appear larger than one centimeter on an x-ray. We disagree. Dr. Scott interpreted the February 26, 2008 and March 10, 2009 CT scans as revealing a 4 cm by 2 cm mass in the right upper lung and a 1.5 cm or 2.0 cm mass in the left lung. Employer's Exhibit 2. Dr. Wheeler interpreted the March 11, 2010 CT as revealing "lobulated and irregular 2-5 cm. masses in [the] upper lobes." Employer's Exhibit 6. Having found that the x-ray interpretations themselves already established the existence of opacities greater than one centimeter in diameter, the administrative law judge permissibly found that the CT scan evidence corroborated the existence of the large opacities. *See Eastern Associated Coal Corp. v. Director, OWCP* [*Scarbro*], 220 F.3d 250, 256, 22 BLR 2-93, 2-101 (4th Cir. 2000) (holding that x-ray evidence displaying opacities greater than one centimeter "can lose force only if other evidence affirmatively shows that the opacities are not there or are not what they seem to be").

We reject employer's argument that the administrative law judge erred in discounting the opinions of Drs. Scott and Wheeler as speculative and equivocal. In *Cox*, a case involving factual circumstances similar to this case, the Fourth Circuit held that an administrative law judge may reject, as speculative and equivocal, the opinions of physicians who exclude coal dust exposure as the cause for large opacities or masses identified by x-ray, and attribute the radiological findings to conditions such as tuberculosis, histoplasmosis or granulomatous disease, if they fail to point to evidence in the record indicating that the miner suffers or suffered from any of the alternative diseases. *See Cox*, 602 F.3d at 285, 24 BLR at 2-284. In resolving the conflict in the evidence, the administrative law judge correctly noted that the record does not document any diagnoses or treatment for any of the diseases put forward by Drs. Scott and Wheeler as potential causes of the large masses in claimant's lungs. Decision and Order at 14. In fact, the administrative law judge accurately noted that there is evidence in the record showing that claimant tested negative for histoplasmosis and tuberculosis.[7] Claimant's Exhibits 3, 4. Therefore, the administrative law judge permissibly accorded less weight to the negative x-ray and CT scan interpretations of Drs. Wheeler and Scott.[8] *See Cox*, 602 F.3d at 285, 24 BLR at 2-284; *Hicks*, 138 F.3d at 533, 21 BLR at 2-336; *Akers*, 131 F.3d at 441, 21 BLR at 2-274.

Employer also contends that the administrative law judge erred in her consideration of the opinions of Drs. Fino and Dahhan. We disagree. The administrative law judge accorded less weight to the opinions of Drs. Fino and Dahhan because the doctors indicated that they would not diagnose complicated pneumoconiosis in the absence of a respiratory impairment. The administrative law judge correctly observed that a finding of complicated pneumoconiosis under the Act does not require a showing of pulmonary impairment. 30 U.S.C. §921(c)(3); 20 C.F.R. §718.304(a)-(c); Decision and Order at 16. Therefore, the administrative law judge permissibly discounted the opinions of Drs. Fino and Dahhan. *See Scarbro*, 220 F.3d at 257-58, 22 BLR at 2-102-05.

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[7] Employer contends that the administrative law judge erred in failing to consider the significance of several x-rays submitted in connection with claimant's prior claims that suggest that claimant had evidence of a healed inflammatory lung disease. Employer's Brief at 9. We disagree. The administrative law judge found that x-ray interpretations suggesting such a process were entitled to less weight because there is no evidence in the record that claimant had been diagnosed or treated for such a disease.

[8] Because the administrative law judge provided a valid basis for according less weight to the opinions of Drs. Wheeler and Scott, we need not address employer's remaining arguments regarding the weight she accorded to their opinions. *See Kozele v. Rochester & Pittsburgh Coal Co.*, 6 BLR 1-378, 1-382 n.4 (1983).

Finally, employer contends that the administrative law judge has not explained her finding of complicated pneumoconiosis in accordance with the Administrative Procedure Act.[9] Employer maintains that because the administrative law judge specifically stated that the evidence considered in isolation at each subsection of 20 C.F.R. §718.304 was insufficient to establish complicated pneumoconiosis, her conclusion that claimant has complicated pneumoconiosis is "illogical." Employer's Brief at 8. Contrary to employer's assertion, the administrative law judge merely noted at the outset of her analysis of the evidence that there was an equal number of positive and negative x-ray readings for complicated pneumoconiosis by qualified radiologists and that the digital x-ray evidence, CT scan evidence, and medical opinion evidence, standing alone, did not establish complicated pneumoconiosis. The administrative law judge, however, properly assessed the credibility of the new evidence in light of *Cox* and explained why the positive x-ray readings were entitled to controlling weight, and why the evidence as a whole established the existence of the disease. *See Cox*, 602 F.3d at 285, 24 BLR at 2-284; *Scarbro*, 220 F.3d at 256, 22 BLR at 2-101 (explaining that "all of the evidence must be considered and evaluated to determine whether the 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"). Consequently, we affirm the administrative law judge's finding that claimant is entitled to invocation of the irrebuttable presumption of total disability due to pneumoconiosis at 20 C.F.R. §718.304.[10] *See Lester*, 993 F.2d at 1145-46, 17 BLR at 2-117-18; *Melnick*, 16 BLR at 1-33-34. In light of this finding, we also affirm the administrative law judge's finding that claimant established that one of the applicable conditions of entitlement has changed since the date upon which the denial of claimant's prior claim became final. 20 C.F.R. §725.309(d). We, therefore, affirm the administrative law judge's award of benefits.

[9] The Administrative Procedure Act provides that every adjudicatory decision must be accompanied by a statement of "findings and conclusions, and the reasons or basis therefor, on all the material issues of fact, law, or discretion presented on the record." 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 30 U.S.C. §932(a), by means of 33 U.S.C. §919(d) and 5 U.S.C. §554(c)(2).

[10] The administrative law judge noted that the record also contains evidence submitted in connection with claimant's previous claims. However, the administrative law judge reasonably relied upon the more recent evidence, which she found more accurately reflected claimant's condition at the time of the hearing. *See Cooley v. Island Creek Coal Co.*, 845 F.2d 622, 11 BLR 2-147 (6th Cir. 1988); *Wetzel v. Director, OWCP*, 8 BLR 1-139 (1985); Decision and Order at 18-19.

Accordingly, the administrative law judge's Decision And Order awarding 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