BRB No. 10-0467 BLA

DAVID D. BOYD	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
NICKS COAL COMPANY	)	
	)	
and	)	
	)	
ASHLAND COAL, INCORPORATED	)	DATE ISSUED: 04/27/2011
	)	
Employer/Carrier-Petitioners	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order Award of Claim of Daniel F. Solomon, Administrative Law Judge, United States Department of Labor.

Paul E. Jones and James W. Herald, III (Jones, Walters, Turner & Shelton PLLC), Pikeville, Kentucky, for employer/carrier.

Rita Roppolo (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: DOLDER, Chief Administrative Appeals Judge, SMITH and BOGGS, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order Award of Claim (2007-BLA-05503) of Administrative Law Judge Daniel F. Solomon (the administrative law judge) rendered on

a subsequent claim filed pursuant to the provisions of Title IV 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). The administrative law judge accepted the parties' stipulation to seventeen years of coal mine employment. Adjudicating this claim pursuant to 20 C.F.R. Part 718, the administrative law judge found that the evidence of record established the existence of complicated pneumoconiosis arising out of coal mine employment, 20 C.F.R. §§718.203, 718.304, and that claimant was, therefore, entitled to the irrebuttable presumption of total disability due to pneumoconiosis at Section 411(c)(3) of the Act, 30 U.S.C. §921(c)(3). Accordingly, benefits were awarded.

On appeal, employer contends that the administrative law judge erred in finding the existence of complicated pneumoconiosis established at Section 718.304, based on his faulty and limited evaluation of the x-ray evidence.[1] The Director, Office of Workers' Compensation Programs, responds, urging affirmance of the administrative law judge's decision awarding benefits. Claimant has not responded 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 rational, and are consistent with the applicable law,[2] they are binding upon this Board and may not be disturbed. 33 U.S.C. §921(b)(3), as incorporated into the Act by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman and Grylls Associates, Inc.*, 380 U.S. 359 (1965).

To be entitled 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).

[1] The administrative law judge's finding, "that there was no current biopsy or other evidence to the contrary that would outweigh the x-ray evidence[,]" is affirmed, as unchallenged on appeal. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

[2] The record indicates that claimant was last employed in the coal mining industry in Kentucky. *See* Hearing Transcript at 8. Accordingly, the Board will apply the law of the United States Court of Appeals for the Sixth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*).

Where a miner files a claim for benefits more than one year after the final denial of a previous claim,[3] 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 previous claim was denied because he failed to establish total disability. *See* Director's Exhibit 2. Consequently, in order to show a change in an applicable condition of entitlement, claimant had to submit new evidence of total disability. If the administrative law judge determined that the new evidence established such a change, he was to then determine whether entitlement to benefits was established by considering and weighing all the evidence of record, relevant to each element of entitlement. 20 C.F.R. §725.309(d); *see Sharondale Corp. v. Ross*, 42 F.3d 993, 19 BLR 2-10 (6th Cir. 1994).

Complicated Pneumoconiosis

Section 411(c)(3) of the Act, 30 U.S.C. §921(c)(3), implemented by 20 C.F.R. §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 which would yield results equivalent to (a) or (b). 30 U.S.C. §921(c)(3); 20 C.F.R. §718.304; *Eastern Assoc. Coal Corp. v. Director, OWCP* [*Scarbro*], 220 F.3d 250, 255, 22 BLR 2-93, 2-100 (4th Cir. 2000). 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. Rather, the administrative law judge must examine all the evidence on this issue, *i.e.*, evidence of simple and complicated pneumoconiosis, as well as evidence that pneumoconiosis is not present, resolve any conflict, and make a finding of fact. *Lester v. Director, OWCP*, 993 F.2d 1143, 1145-46, 17 BLR 2-114, 2-117-18 (4th Cir. 1993);

[3] Claimant filed his first claim for benefits on October 2, 1996. Director's Exhibit 1. That claim was denied by Administrative Law Judge Robert L. Hillyard because claimant, despite establishing the existence of simple pneumoconiosis, failed to establish total disability. The denial of that claim was affirmed by the Board in *Boyd v. Nicks Coal Co.*, BRB No. 99-0804 BLA (May 17, 2000)(unpub.). Claimant requested modification on June 5, 2000. The denial of that request was affirmed by the Board in *Boyd v. Nicks Coal Co.*, BRB No. 04-0525 BLA (Jan. 14, 2005)(unpub.). Claimant filed this subsequent claim on March 8, 2006. Director's Exhibit 3.

Gray v. SLC Coal Co., 176 F.3d 382, 388, 21 BLR 2-615, 2-626 (6th Cir. 1999); *Gollie v. Elkay Mining Corp*., 22 BLR 1-306, 1-311 (2003); *Melnick v. Consolidation Coal Co*., 16 BLR 1-31, 1-33 (1991)(*en banc*).

In finding that the new evidence established complicated pneumoconiosis, the administrative law judge determined that a preponderance of the new x-rays was read as positive for the disease, the most recent x-ray was read as positive for the disease, and there was no biopsy or other evidence that "outweighed the x-ray evidence." Decision and Order at 5. The administrative law judge's discussion of the new evidence is, however, faulty and limited. Specifically, the administrative law judge mischaracterized the x-ray reading of Dr. Baker as showing complicated pneumoconiosis when, in fact, Dr. Baker read it as showing simple pneumoconiosis. *See* Director's Exhibit 14. Moreover, the administrative law judge did not identify the x-ray read by Dr. Baker. *See* Decision and Order at 5. The administrative law judge also referred to the superior qualifications of Drs. Ahmed and Alexander, but failed to identify and discuss the x-rays they read. *Id*. at 4. Further, the administrative law judge referred to Dr. Wheeler's negative reading of the October 9, 2006 x-ray and to his negative reading of the x-ray read as positive for simple pneumoconiosis by Drs. Baker and DePonte. However, he did not otherwise identify and discuss Dr. Wheeler's negative readings, other than to say that "his readings in the current record are aberrant." *Id*. at 5. Finally, the administrative law judge based his finding of complicated pneumoconiosis, in part, on the reading by Dr. DePonte of the most recent x-ray of January 4, 2007. *Id*. In according greater weight to this reading, however, the administrative law judge did not discuss the fact that less than a year separated the x-ray from the April 25, 2006 x-ray, read as showing simple pneumoconiosis, and that approximately three months separated the x-ray from the October 9, 2006 x-ray, read as negative by Dr. Wheeler. *See Adkins v. Director, OWCP*, 958 F.2d 49, 16 BLR 2-61 (4th Cir. 1992). Consequently, the administrative law judge's finding of complicated pneumoconiosis at Section 718.304 and his finding that a change in an applicable condition of entitlement was established pursuant to Section 725.309(d), must be vacated and the case remanded for further consideration of all the new x-ray evidence relevant to the existence of complicated pneumoconiosis. *See Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162 (1989); *Tackett v. Director, OWCP*, 7 BLR 1-703 (1985).

Further, in addressing the merits, the administrative law judge stated that he "read the entire record." Decision and Order at 2. The administrative law judge did not, however, specifically address and discuss the old evidence, in addition to the new evidence, in determining that complicated pneumoconiosis was established at Section 718.304. On remand, therefore, if reached, the administrative law judge must do so in determining whether complicated pneumoconiosis is established at Section 718.304. *See Ross*, 42 F.3d at 999, 19 BLR at 2-20-21.

Section 411(c)(4)

If, on remand, the administrative law judge finds that claimant is not entitled to the irrebuttable presumption of totally disabling pneumoconiosis at Section 411(c)(3), 30 U.S.C. §921(c)(3), he must consider whether claimant is entitled to the rebuttable presumption of totally disabling pneumoconiosis at Section 411(c)(4), 30 U.S.C. §921(c)(4).[4] If the administrative law judge credits claimant with at least fifteen years of qualifying coal mine employment and finds that he is entitled to invocation of the Section 411(c)(4) presumption, the administrative law judge must then consider whether employer has satisfied its burden to rebut the presumption. On remand, the administrative law judge must allow the parties the opportunity to submit additional evidence to address the change in law, *see Harlan Bell Coal Co. v. Lamar*, 904 F.2d 1042, 1047-50, 14 BLR 2-1, 2-7-11 (6th Cir. 1990); *Tackett v. Benefits Review Board*, 806 F.2d 640, 642, 10 BLR 2-93, 2-95 (6th Cir. 1986), in compliance with the evidentiary limitations at 20 C.F.R. §725.414. If evidence exceeding those limitations is proffered, its admission must be justified by a showing of good cause pursuant to 20 C.F.R. §725.456(b)(1).

[4] On March 23, 2010, amendments to the Act, affecting claims filed after January 1, 2005, that were pending on or after March 23, 2010, were enacted. In pertinent part, the amendments reinstated Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4), which provides a rebuttable presumption that a miner is totally disabled due to pneumoconiosis, if fifteen or more years of qualifying coal mine employment and a totally disabling respiratory impairment, *see* 20 C.F.R. §718.204(b), are established.

Accordingly, the administrative law judge's Decision and Order Award of Claim is affirmed in part, vacated in part, and the case is remanded for further consideration consistent with this opinion.

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