BRB No. 99-1166 BLA

ARTHUR BOOTH	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
WOLF CREEK COLLIERIES	)	DATE ISSUED:
	)	
and	)	
	)	
ZIEGLER COAL HOLDING COMPANY	)	
	)	
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 Benefits of Daniel J. Roketenetz, Administrative Law Judge, United States Department of Labor.

Leonard Staton, Inez, Kentucky, for claimant.

Laura Metcoff Klaus (Arter & Hadden), Washington, D.C., for employer.

Before: SMITH and McGRANERY, Administrative Appeals Judge's, and NELSON, Acting Administrative Appeals Judge.

SMITH, J.:

Employer appeals the Decision and Order (1998-BLA-0766) of Administrative Law Judge Daniel J. Roketenetz awarding benefits on 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).

The relevant procedural history of this case is as follows: Claimant filed his first claim for benefits on October 5, 1988. Decision and Order at 3; Director's Exhibit 41. That claim was denied by the district director on March 29, 1989. *Id*. Claimant filed the instant claim on August 11, 1997. Director's Exhibit 1. The district director initially found claimant entitled to benefits. Director's Exhibit 27. The case was transferred to the Office of Administrative Law Judges for a formal hearing on April 30, 1998. Decision and Order at 2; Director's Exhibit 42.

The administrative law judge credited claimant with approximately twenty-six years of coal mine employment and adjudicated this duplicate claim pursuant to 20 C.F.R. Part 718. Pursuant to the governing holding in *Sharondale Corp. v. Ross,* 42 F.3d 993, 19 BLR 2-10 (6th Cir. 1994), the administrative law judge considered the evidence generated subsequent to the last claim and found that claimant established the existence of simple pneumoconiosis at Section 718.202(a)(1) and thus established a material change in conditions pursuant to Section 725.309(d). The administrative law judge next found that as the record did not contain any biopsy evidence, Section 718.202(a)(2) was inapplicable. The administrative law judge further found, pursuant to Section 718.202(a)(3), that the presumptions provided at Section 718.305 and Section 718.306 do not apply in this living miner's claim filed after March 1, 1978. 20 C.F.R. §718.202(a)(3). The administrative law judge did find, however, that the evidence was sufficient to establish the existence of complicated pneumoconiosis at Section 718.304 and he concluded that claimant was entitled to the irrebuttable presumption of total disability due to pneumoconiosis arising out of coal mine employment. *See* 20 C.F.R. §§718.203, 718.304. The administrative law judge also assessed the medical opinion evidence and found that the existence of simple pneumoconiosis was established as well pursuant to Section 718.202(a)(4). Accordingly, benefits were awarded as of the month in which the instant claim was filed. On appeal, employer contends that the administrative law judge erred in finding a material change in conditions pursuant to Section 725.309(d) and in finding claimant entitled to the irrebuttable presumption set out at Section 718.304. Claimant responds in support of the administrative law judge's award of benefits. The Director, Office of Workers' Compensation Programs (the Director), has filed a letter indicating that he will not participate in this appeal unless requested to do so.

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 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).

In order to establish entitlement to benefits in a living miner's claim pursuant to 20 C.F.R. Part 718, claimant must establish that he suffers from pneumoconiosis; that the pneumoconiosis arose out of coal mine employment; and that the pneumoconiosis is totally disabling. *See* 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure of claimant 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). Moreover, a miner is considered totally disabled due to pneumoconiosis if the irrebuttable presumption in Section 718.304 applies. 20 C.F.R. §718.204(b). Section 411(c)(3)(A) of the Act, implemented by Section 718.304(a) 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, when diagnosed by chest x-ray, "yields one or more large opacities (greater than one centimeter in diameter) and would be classified in category A, B, or C." 30 U.S.C. §921(c)(3)(A); 20 C.F.R. §718.304(a).

Where a claimant 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 there has been a material change in conditions. 20 C.F.R. §725.309(d). The United States Court of Appeals for the Sixth Circuit, within whose jurisdiction this case arises, has held pursuant to Section 725.309(d), that the administrative law judge must determine whether the evidence developed since the prior denial establishes at least one of the elements previously adjudicated against claimant. *Ross*, *supra*. If a material change in conditions is established, the administrative law judge must then consider whether all of the evidence establishes entitlement to benefits. *Ross, supra*.

Employer initially contends that the administrative law judge erred in finding a material change in conditions established under Section 725.309(d), based on his finding that a preponderance of the newly submitted x-ray evidence was positive at Section 718.202(a)(1) when the x-ray evidence in the previous claim was also positive and subject to the prohibitions of Section 413(b) of the Act. *See* 30 U.S.C. §923(b). We disagree. The initial claim in this case was filed in 1988 and Section 413(b) of the Act, 30 U.S.C. §923(b), does not apply to claims filed after January 1, 1982. *See* 20 C.F.R. §§727.206(b)(1); 718.202(a)(1)(I), *Auxier v. Director, OWCP*, 4 BLR 1-717 (1982). Moreover, employer contested the issue of the existence of pneumoconiosis throughout these proceedings and raises the issue of the district director's finding in the previous claim for the first time on appeal herein. In *Lukman v. Director, OWCP*, 896 F.2d 1248, 13 BLR 2-332 (10th Cir. 1990), the court ruled that "[t]he sole purpose of Section 725.309(d) was to provide relief from the ordinary

principles of finality and *res judicata* to miners whose physical condition deteriorates" so as " ... to permit new claims to be filed even where modification under Section 725.310(a) was no longer available because more than a year had passed since the first claim was denied." *Lukman*, 896 F.2d 1249, 1250, 13 BLR 2-335, 2-336. The court, thereafter, determined that all claims, whether the initial claim or a subsequent (duplicate) claim, must be processed essentially the same and must be adjudicated on the traditional three-tier system. The court specifically held that the district director must determine simultaneously whether: (1) there has been a material change in conditions, and (2) whether the claimant is entitled to benefits. *Id*. After such determinations by the district director, a claimant is entitled to a hearing before an administrative law judge to examine both issues *de novo*. *Id*. Finally, review on the merits of the administrative law judge's decision by the Board and the appropriate court of appeals is to be made available. *Id*.

In making his findings at Section 718.202(a)(1) with respect to a material change in conditions, the administrative law judge found that the vast preponderance of the newly submitted x-ray evidence was, beginning with the August 19, 1997 x-ray, positive, while also noting that a large opacity was identified, as well as the comments of the interpreters appearing on the face of the x-ray reports regarding the source of the opacity. Decision and Order at 5-9. The administrative law judge reasonably relied on the recency of the x-ray evidence and the qualifications of the physicians to find the existence of simple pneumoconiosis established at Section 718.202(a)(1). *See Woodward v. Director, OWCP,* 991 F.2d 314, 17 BLR 2-77 (6th Cir. 1993); *Cooley v. Island Creek Coal Co.,* 845 F.2d 622, 11 BLR 2-147 (6th Cir. 1988). We therefore affirm the administrative law judge's finding of a material change in conditions based on his finding that the existence of simple pneumoconiosis was established at Section 718.202(a)(1). 20 C.F.R. §725.309(d); *Ross, supra*.

Employer next raises two challenges with respect to the administrative law judge's consideration of the evidence of complicated pneumoconiosis at Section 718.304, asserting that the administrative law judge ignored relevant evidence, other than the x-ray evidence, as well as asserting that the administrative law judge's analysis of the x-ray evidence itself was flawed.

With respect to his finding of the existence of complicated pneumoconiosis at Section 718.304, the administrative law judge initially gave diminished weight to the opinions of Drs. Wiot and Dahhan, on the basis that he found they ruled out both the possibility of a large opacity as well as the possibility of simple pneumoconiosis, contrary to the remaining physicians who at least found simple pneumoconiosis. Decision and Order at 10. The administrative law judge then stated that:

> "Several B-readers and board-certified radiologists found complicated pneumoconiosis, while at the same time noting the possibility of a neoplasm. This does not, however, negate their positive readings for complicated pneumoconiosis. Many of those readings definitively find complicated pneumoconiosis, while raising the possibility of a neoplasm or carcinoma. Based upon the numerous positive readings for complicated pneumoconiosis by highly qualified physicians, I find that the Claimant has established that he is suffering from complicated pneumoconiosis pursuant to 20 C.F.R. §718.304."

Decision and Order at 10.

Employer asserts that the administrative law judge erred in failing to weigh all relevant evidence together, arguing that he considered only the x-ray evidence, but ignored claimant's pulmonary function and blood gas studies which do not show that claimant is totally disabled, and thus suggest that claimant does not have complicated pneumoconiosis. Employer's Brief at 16-18. Contrary to employer's assertion, it was within the administrative law judge's discretion to exclude the pulmonary function and blood gas studies in determining whether claimant suffers from complicated pneumoconiosis since the diagnosis of complicated pneumoconiosis is made by x-ray, autopsy or biopsy, or their equivalents, *see* 20 C.F.R. §718.304(a)-(c), and does not require claimant to prove total disability. *See Trent*, *supra*, 11 BLR at 1-28 (pulmonary function studies not relevant to a determination at 718.304(c)); *Adams v. Director, OWCP*, 886 F.2d 818, 820, 13 BLR 2-52, 2-54 (6th Cir. 1989)(claimant need not prove an element where he is aided by a presumption).

With respect to the administrative law judge's finding that the x-ray evidence alone was sufficient to establish the existence of complicated pneumoconiosis, we agree with employer's contention that the administrative law judge's cursory analysis of the totality of the x-ray interpretations and his summary dismissal of the various alternative narrative explanations regarding the etiology of the large opacity viewed on the x-rays does not comply with the Administrative Procedure Act (APA), 5 U.S.C. §557(c)(3)(A). The APA provides that every adjudicatory decision must be accompanied by a statement of findings of fact and conclusions of law and the basis therefor on all material issues of fact, law or discretion presented in the record, 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 5 U.S.C. §554(c)(2), 33 U.S.C. §919(d) and 30 U.S.C. §932(a); *see Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162 (1989). Although the administrative law judge provided a detailed list of the physicians' comments in his analysis of the evidence at Section 718.202(a)(1), in his

discussion at Section 718.304 he did not adequately explain his basis for finding that the evidence supportive of a finding of complicated pneumoconiosis was more credible than the evidence supportive of a finding that claimant actually has a neoplasm or cancer or another disease and does not suffer from complicated pneumoconiosis. As such, his analysis does not comply with the APA. The introduction of legally sufficient evidence of complicated pneumoconiosis does not automatically qualify a claimant for invocation of the irrebuttable presumption found at 20 C.F.R. §718.304. In evaluating x-ray evidence, an administrative law judge should focus on the number of x-ray interpretations, along with the readers' qualifications, dates of film, quality of film and the actual reading as well as any narrative comments which tend to undermine the ILO classifications. *See* 20 C.F.R. §718.102(b); *Dixon v. North Camp Coal Co.*, 8 BLR 1-344 (1985); *Roberts v. Bethlehem Mines Corp.*, 8 BLR 1-211 (1985); *see also Wheatley v. Peabody Coal Co.*, 6 BLR 1-1214 (1984); *see generally Gober v. Reading Anthracite Co.*, 12 BLR 1-67 (1988). As a consequence, we vacate the administrative law judge's finding that the existence of complicated pneumoconiosis was established and that claimant is entitled to the irrebuttable presumption pursuant to Section 718.304. We remand the case to the administrative law judge to consider the x-ray readings in their entirety, make findings on the merits and provide a more complete rationale in weighing all relevant evidence on the issue of the existence of complicated pneumoconiosis at Sections 718.202(a)(3) and 718.304, with special consideration given to the readers' comments as to whether or not the changes represented complicated pneumoconiosis or neoplasm or cancer or other disease processes. If, on remand, the administrative law judge finds that the evidence is insufficient to establish the existence of complicated pneumoconiosis, he is instructed to determine whether the evidence establishes the remaining elements of entitlement.

Accordingly, the Decision and Order - Award of Benefits of the administrative law judge is affirmed in part, vacated in part, and the case is remanded to the administrative law judge for proceedings consistent with this opinion.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

I concur:

MALCOLM D. NELSON, Acting
Administrative Appeals Judge

McGRANERY, J., concurring:

I concur in my colleagues' determination that the case must be remanded for the administrative law judge to discuss with specificity the evidence relating to complicated pneumoconiosis. 5 U.S.C. §557. I do so reluctantly since the administrative law judge's finding that the existence of complicated pneumoconiosis was established by x-ray is obviously correct. Furthermore, the administrative law judge was also correct in finding that the comments of some doctors raising the possibility of neoplasm or carcinoma do no negate the definitive findings of complicated pneumoconiosis. As the court observed in *Eastern Associated Coal Corp v. Director, OWCP*, 2000 WL 961592,*3 (4thCir.): "the x-ray evidence [of complicated pneumoconiosis] can lose force only if other evidence *affirmatively shows* that the opacities are not there or are not what they seem to be ..." (emphasis added). None of the medical opinions at issue affirmatively shows that the opacity is not complicated pneumoconiosis. However, it is reasonable to read medical opinions which take into consideration various possibilities as "simply acknowledging the uncertainty inherent in medical opinions." *Piney Mountain Coal Co. v. Mays*, 176 F.3d 753, 21 BLR 2-587 (4th Cir. 1999). The weight to be given such opinions is a question for the trier of fact. *Id*. On remand, the administrative law judge can easily demonstrate how he determined that claimant establishes the existence of complicated pneumoconiosis by x-ray.

REGINA C. McGRANERY
Administrative Appeals Judge