BRB No. 08-0135 BLA

P.B.	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
GOLDEN OAK MINING COMPANY	)	DATE ISSUED: 08/29/2008
	)	
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 Awarding Benefits of Kenneth A. Krantz, Administrative Law Judge, United States Department of Labor.

Joseph E. Wolfe (Wolfe Williams Rutherford & Reynolds), Norton, Virginia, for claimant.

Laura Metcoff Klaus (Greenberg Traurig LLP), Washington, D.C., for employer.

Sarah M. Hurley (Gregory F. Jacob, Solicitor of Labor; Rae Ellen Frank James, Acting 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: SMITH, McGRANERY, and HALL, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order Awarding Benefits (06-BLA-5762) of Administrative Law Judge Kenneth A. Krantz on a subsequent claim[1] 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). Adjudicating the subsequent claim pursuant to 20 C.F.R. Part 718, the administrative law judge found that the parties stipulated that the miner worked in qualifying coal mine employment for nineteen years. The administrative law judge found that the new x-ray and medical opinion evidence submitted in support of this subsequent claim was sufficient to establish the presence of complicated pneumoconiosis. Accordingly, the administrative law judge determined that claimant established invocation of the irrebuttable presumption of total disability due to pneumoconiosis pursuant to 30 U.S.C. §921(c)(3), as implemented by 20 C.F.R. §718.304. Based on his determination that complicated pneumoconiosis arising out of coal mine employment was established, and because such a condition presumptively demonstrated total respiratory disability, 20 C.F.R. §718.204(b)(1), the administrative law judge found that claimant demonstrated that one of the applicable conditions of entitlement had changed since the prior claim was denied pursuant to 20 C.F.R. §725.309. Next, considering all the evidence of record *de novo*, the administrative law judge found that the weight of the evidence was sufficient to establish the presence of complicated pneumoconiosis arising out of coal mine employment under 20 C.F.R. §§718.203(b), 718.304. Benefits were, therefore, awarded, commencing as of January 2003, the month in which complicated pneumoconiosis was first diagnosed.

On appeal, employer argues that the administrative law judge erred in awarding benefits in a subsequent claim based on a mistake in a determination of fact, since there is no such mistake-based theory set forth in Section 725.309. Employer also contends that the administrative law judge erred in finding that the date for the commencement of benefits was January 2003. Claimant has filed a response brief, urging affirmance of the

[1] Claimant filed his first application for benefits on August 16, 2000; this claim was denied on November 13, 2000 and administratively closed thereafter. Director's Exhibits 1-3, 1-64. Claimant's second application, filed on December 19, 2002, was initially denied by the district director on December 22, 2003 because claimant failed to establish total respiratory disability. Director's Exhibit 2-139. On March 12, 2004, claimant submitted a request for modification with supportive medical evidence, specifically, Dr. DePonte's interpretation of the August 11, 2003 x-ray. Director's Exhibit 2-11. The district director found that Dr. DePonte's reading was already a part of the record and could not serve as a basis for modification. After reviewing the record, the district director concluded that claimant failed to establish either a change in conditions or a mistake in fact and denied modification. Director's Exhibit 2-3. Consequently, claimant filed a third application on May 31, 2005, which is pending herein on appeal. Director's Exhibit 4.

award of benefits and conceding that the administrative law judge erred in his commencement of benefits date determination. The Director, Office of Workers' Compensation Programs (the Director), has filed a response letter, arguing that employer's argument on Section 725.309 ignores the fact that the regulation permits a party to establish a change in an applicable condition of entitlement without an investigation of whether the denial of the prior claim was correct. In addition, the Director agrees with the parties that the administrative law judge erred in his commencement of benefits determination. Employer has filed a brief in reply to the Director's response letter, arguing that Section 725.309(d) cannot be satisfied absent proof of change, as both the language of the regulation as well as case law articulated by the United States Court of Appeals for the Sixth Circuit[2] clearly mandate that proof of an actual change in conditions is required.[3]

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, 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).

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; *Peabody Coal Co. v. Hill*, 123 F.3d 412, 21 BLR 2-192 (6th Cir. 1997); *Trent v. Director, OWCP*, 11 BLR 1-26 (1987). Failure to establish any one of these elements precludes entitlement. *Perry v. Director, OWCP*, 9 BLR 1-1 (1986) (*en banc*).

Where 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 "one of the applicable conditions of entitlement . . . has changed

[2] The Board will apply the law of the United States Court of Appeals for the Sixth Circuit as claimant's coal mine employment occurred in Kentucky. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (*en banc*); Director's Exhibit 1-62.

[3] We affirm the administrative law judge's findings that claimant worked in qualifying coal mine employment for nineteen years and that the evidence established the presence of complicated pneumoconiosis arising out of coal mine employment on the merits pursuant to 20 C.F.R. §§718.203(b) and 718.304 as these findings are unchallenged on appeal. *See Coen v. Director, OWCP*, 7 BLR 1-30, 1-33 (1984); *Skrack v. Director, OWCP*, 6 BLR 1-710 (1983); Decision and Order at 13-15.

since the date upon which the order denying the prior claim became final." 20 C.F.R. §725.309(d). 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 failed to establish a totally disabling respiratory impairment pursuant to Section 718.204(b). Director's Exhibits 2-3, 2-139.

Employer initially contends that the administrative law judge erred in finding that claimant demonstrated a change in an applicable condition of entitlement pursuant to Section 725.309, based on his finding that the newly submitted evidence in support of this subsequent claim established the presence of complicated pneumoconiosis pursuant to Section 718.304. Employer alleges it was error to find a change in conditions because the administrative law judge also found that there was a mistake in fact in the district director's denial of the previous claim pursuant to 20 C.F.R. §725.310. Essentially, employer argues that because the administrative law judge properly determined that the denial of the previous claim was mistaken, claimant is unable to prove a change in conditions pursuant to 20 C.F.R. §725.309, which is a prerequisite to an award of benefits in a subsequent claim.

At the conclusion of his discussion of the newly submitted evidence, the administrative law judge found that the x-ray evidence established a change in conditions since it demonstrated the presence of complicated pneumoconiosis. He also found that Dr. Forehand's x-ray interpretation of complicated pneumoconiosis, which was in the record in the prior claim, was later verified by readings in the record of the subsequent claim. Apparently, based upon Dr. Forehand's reading in the prior claim, the administrative law judge determined that the district director's denial of benefits reflected a mistake in fact pursuant to Section 725.310. Decision and Order at 14-15.

Because this subsequent claim, dated May 31, 2005, was filed more than one year after the denial of the prior claim, it does not constitute a request for modification pursuant to Section 725.310. The prior claim, filed on December 19, 2002, was denied on April 16, 2004, and consequently, the May 2005 claim is subject to the provisions governing subsequent claims set forth in Section 725.309, not the regulations concerning modification requests pursuant to Section 725.310. *See* 20 C.F.R. §§725.309, 725.310; Decision and Order at 14-15. Therefore, the administrative law judge erred in making a determination pursuant to the modification regulation. Notwithstanding this determination, however, the administrative law judge also found, "that Claimant has established that he suffers from complicated pneumoconiosis… [t]hus, he has demonstrated that one of the applicable conditions of entitlement – total disability –has changed since the date upon which the prior claim was denied." Decision and Order at 13. Hence, we deem the administrative law judge's determination that the x-ray evidence established a mistake in a determination of fact harmless error because the administrative law judge properly rendered a determination pursuant to Section 725.309 that an

applicable condition of entitlement had changed since the prior claim was denied. *See Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984); Decision and Order at 14. Further, the administrative law judge's Section 725.309 determination served as the ultimate basis for his decision to adjudicate the claim on the merits. *See Tennessee Consol. Coal Co. v. Kirk*, 264 F.3d 602, 22 BLR 2-288 (6th Cir. 2001); *Sharondale Corp. v. Ross*, 42 F.3d 993, 19 BLR 2-10 (6th Cir. 1994). Employer's argument is, therefore, rejected.

Employer additionally argues that because there was evidence of complicated pneumoconiosis in the prior claim, there is no basis for a determination that claimant's condition has changed since the denial of that claim. Employer contends that claimant's subsequent claim must be denied under Section 725.309 since the prior claim contained x-ray interpretations of Category A pneumoconiosis and, thus, evidence of complicated pneumoconiosis in the subsequent claim cannot prove the requisite change in an applicable condition of entitlement, as a matter of law. In addition, employer urges that the holdings articulated in *Pittston Coal Group v. Sebben*, 488 U.S. 105, 12 BLR 2-89 (1988), and *Ross* strictly prohibit an award of benefits on a subsequent claim in cases where the Department of Labor erroneously denied the prior claim.

The Director responds and, relying on language contained in the preamble to Section 725.309, argues that the new regulations substituted a threshold test that allows a miner to litigate his entitlement to benefits without regard to any findings in prior claims by producing new evidence establishing any of the elements of entitlement previously resolved against him. *See* 65 Fed. Reg. 79968 (Dec. 20, 2000); 64 Fed. Reg. 54984 (Oct. 8, 1999). Hence, the Director argues that the standard in Section 725.309 effectuated the decision of the United States Court of Appeals for the Fourth Circuit in *Lisa Lee Mines v. Director, OWCP*, 86 F.3d 1358 (4th Cir. 1996), *cert. denied*, 117 S. Ct. 763 (1997), by accepting the correctness of the earlier denial of benefits and, consequently, by permitting a change to be established without an investigation of whether the prior denial was correct. Under the amended regulation contained in Section 725.309, the prior denial of claimant's December 2002 claim, rendered by the district director on April 16, 2004, is deemed to be correct. *See* 20 C.F.R. §725.309; 65 Fed. Reg. 79968 (Dec. 20, 2000); 64 Fed. Reg. 54984 (Oct. 8, 1999). Additionally, the Director avers that employer's allegation that the prior claim should have been awarded lacks merit. The Director is correct.

Employer contends that the weight of the evidence in the previous claim established the existence of complicated pneumoconiosis: two readings (by Drs. Forehand and Deponte) against one (by Dr. Dahhan). Addressing employer's argument that there was evidence of pneumoconiosis in the prior claim, the administrative law judge properly found that the district director declined to consider Dr. DePonte's Category A x-ray reading on two occasions: when reviewing the merits of entitlement on December 22, 2003 and when reviewing the request for modification on April 16, 2004,

because claimant did not submit the original x-ray film in accordance with Section 718.102(d).[4] *See* 20 C.F.R. §§718.101(b), 718.102(d); Decision and Order at 14; Director's Exhibits 2-3, 2-41. As a result, the evidence in the prior claim was in equipoise: Dr. Forehand's reading against Dr. Dahhan's reading. Hence, employer's argument that the evidence of Category A pneumoconiosis in the prior claim precludes a determination of a change in an applicable condition of entitlement pursuant to Section 725.309 is rejected.[5]

We next turn to employer's challenge to the administrative law judge's date of commencement of benefits. Employer urges that pertinent case law, as well as the provisions set forth in Section 725.309, preclude an award of benefits for any period before the prior claim was denied. Claimant and the Director agree, contending that the administrative law judge erred in determining the date of commencement of benefits as

[4] In an x-ray report dated August 14, 2003, Dr. Kathleen DePonte, Board-certified radiologist and B reader, classified an x-ray film dated August 11, 2003 as "r/q, 2/2" pneumoconiosis and found Category A large opacities present. Director's Exhibits 2-9, 2-13, 2-41.

[5] A review of the record belies employer's contention that the prior claim was wrongly denied. Claimant's prior application, filed on December 19, 2002, was initially denied by the district director on December 22, 2003 because claimant did not establish total disability. Director's Exhibit 2-41. On March 12, 2004, claimant submitted a request for modification with supportive medical evidence, specifically, Dr. DePonte's interpretation of the August 11, 2003 x-ray. Director's Exhibit 2-11. The district director found that Dr. DePonte's x-ray report was not new evidence and was already part of the record, and therefore, could not serve as the basis for modification. Thus, on April 16, 2004, the district director concluded that claimant failed to establish a mistake in a determination of fact or a change in conditions as no new evidence was submitted and the old evidence did not establish total disability. Director's Exhibit 2-3. In addition, the district director created a Memorandum to the File, also dated April 16, 2004, in which he explained that claimant submitted Dr. DePonte's x-ray report in support of his modification request, but claimant had previously submitted this report prior to the last denial and, therefore, it could not be used as a basis for modification. Next, the district director explained that "the medical evidence [was] in equipoise" since Dr. Forehand diagnosed complicated pneumoconiosis and total disability while Dr. Dahhan, who was equally-qualified, diagnosed simple pneumoconiosis and no pulmonary impairment. Director's Exhibit 2-6. Further, the district director noted that even though Dr. DePonte's x-ray reading showing complicated pneumoconiosis was contained in the record, claimant failed to submit the original chest x-ray and, thus, this reading could not be considered.

January 2003, as Section 725.309(d)(5) precludes an award of benefits prior to the most recent denial of the prior claim, which was April 16, 2004. We agree.

Section 725.309(d)(5) provides, "In any case in which a subsequent claim is awarded, no benefits may be paid for any period prior to the date upon which the order denying the prior claim became final." 20 C.F.R. §725.309(d)(5). Addressing the issue of the date on which benefits commence, the administrative law judge awarded benefits commencing as of January 2003, the date on which complicated pneumoconiosis was first diagnosed. Decision and Order at 16. The regulations state that in determining the date of commencement of benefits, the month in which a claim is filed is the operative date unless medical evidence supports an earlier date. 20 C.F.R. §725.503(b). Because Section 725.309(d)(5) precludes an award of benefits prior to the date of the denial of the prior claim, we modify the administrative law judge's decision to reflect an onset date of May 2005, in accordance with Sections 725.309(d)(5) and 725.503(b).

In conclusion, we affirm the administrative law judge's determinations that because the newly submitted x-ray and medical opinion evidence was sufficient to establish that claimant suffered from complicated pneumoconiosis pursuant to Section 718.304(a) and (c), claimant presumptively established total respiratory disability, and thus, demonstrated a change in an applicable condition of entitlement at Section 725.309(d). We also affirm the administrative law judge's determination on the merits that claimant established the presence of complicated pneumoconiosis arising out of coal mine employment pursuant to Sections 718.203(b) and 718.304 and invocation of the irrebuttable presumption of total disability due to pneumoconiosis pursuant to Section 718.304. *See* 20 C.F.R. §718.304. We modify, however, the administrative law judge's onset date determination and hold that benefits shall commence as of May 2005, the month in which claimant filed the current claim.

Accordingly, the Decision and Order Awarding Benefits of the administrative law judge is affirmed in part and modified in part.

SO ORDERED.

_____
ROY P. SMITH
Administrative Appeals Judge

_____
REGINA C. McGRANERY
Administrative Appeals Judge

_____
BETTY JEAN HALL
Administrative Appeals Judge