BRB No. 09-0772 BLA

PAUL JOHNSON	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	DATE ISSUED: 08/31/2010
	)	
PEABODY WESTERN COAL COMPANY	)	
	)	
Employer-Respondent	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order Denying Living Miner's Benefits of John M. Vittone, Chief Administrative Law Judge, United States Department of Labor.

Jonathan Wilderman (Wilderman & Linnet, P.C.), Denver, Colorado, for claimant.

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

Helen H. Cox (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:

Claimant appeals the Decision and Order Denying Living Miner's Benefits (2007-BLA-05504) of Chief Administrative Law Judge John M. Vittone rendered on a petition for modification of a denial of a subsequent 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).[1] The administrative law judge accepted employer's stipulation to twenty-six years of coal mine employment, and that the biopsy evidence established the existence of simple coal workers' pneumoconiosis arising out of coal mine employment, pursuant to 20 C.F.R. §§718.202(a)(2) and 718.203(b). Considering the newly submitted evidence, the administrative law judge found that claimant did not establish the existence of complicated pneumoconiosis at 20 C.F.R. §718.304, or total disability pursuant to 20 C.F.R. §718.204(b)(2)(i)-(iv). The administrative law judge concluded, therefore, that claimant failed to establish a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309(d). Accordingly, the administrative law judge denied benefits.

On appeal, claimant argues that the administrative law judge erred in failing to find complicated pneumoconiosis established pursuant to Section 718.304(a), (c) and erred in finding that claimant did not establish a change in an applicable condition of entitlement pursuant to Section 725.309(d). Claimant also argues that the administrative law judge erred by failing to consider that the findings of claimant's treating physician are entitled to determinative weight pursuant to 20 C.F.R. §718.104. Employer responds, urging affirmance of the denial of benefits. The Director, Office of Workers' Compensation Programs (the Director) , has filed a letter indicating that he will not respond to claimant's appeal.[2]

---

[1] Claimant filed an application for benefits on June 17, 1997, which the administrative law judge denied on the ground that claimant failed to establish total disability. Director's Exhibit 1. The Board affirmed the denial of benefits in a Decision and Order issued on March 28, 2001. *Johnson v. Peabody Coal Co.*, 00-0613 BLA (Mar. 28, 2001)(unpub). Claimant took no further action until he filed a subsequent claim on January 28, 2004. Director's Exhibit 3. On June 24, 2005, the district director denied benefits. Director's Exhibit 19. Claimant filed a request for modification on May 16, 2006 and on August 4, 2006, the district director issued a Proposed Decision and Order Granting Request for Modification, finding that the evidence established invocation of the irrebuttable presumption of total disability due to pneumoconiosis set forth in 20 C.F.R. §718.304. Director's Exhibits 29, 30. Upon employer's request, the case was referred to the Office of Administrative Law Judges for a formal hearing. Director's Exhibits 36, 45. After the hearing, the administrative law judge issued the Decision and Order Denying Living Miner's Benefits, which is the subject of this appeal.

[2] We affirm, as unchallenged by the parties on appeal, the administrative law judge's acceptance of employer's stipulations to twenty-six years of coal mine employment and the existence of simple pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(2). *Skrack v. Director, OWCP*, 6 BLR 1-710 (1983). We also affirm, as unchallenged by the parties on appeal, the administrative law judge's finding that

By Order dated May 10, 2010, the Board provided the parties with the opportunity to address the impact on this case, if any, of Section 1556 of Public Law No. 111-148, which amended the Act with respect to the entitlement criteria for certain claims filed after January 1, 2005, that were pending on or after March 23, 2010.[3] *Johnson v. Peabody Western Coal Co.*, BRB No. 09-0772 BLA (May 10, 2010)(unpub. Order). Employer and the Director responded and asserted that Section 1556 does not apply in this case because the claims were not filed after January 1, 2005. We agree with employer and the Director and hold that the recent amendments to the Black Lung Benefits Act are not applicable in this case, as claimant's initial and subsequent claims were filed before January 1, 2005. Director's Exhibits 1, 2, 4.

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.[4] 33 U.S.C. §921(b)(3), as incorporated into the Act by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Pursuant to Section 725.309(d), if 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., Inc.*, 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). In this case, because claimant's prior claim was denied for failure to establish total disability, he had to submit new evidence establishing invocation of the irrebuttable presumption of total disability due to pneumoconiosis set forth in Section 718.304, or that he is totally disabled pursuant

---

claimant failed to establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(i)-(iv). *Id.*

[3] Relevant to this living miner's claim, Section 1556 of Pub. L. No. 111-148, 124 Stat. 119 (2010) (to be codified at 30 U.S.C. §§921(c)(4)), reinstated the "15-year presumption" of total disability due to pneumoconiosis set forth in Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4).

[4] Although the administrative law judge determined that this case arises within the jurisdiction of the United States Court of Appeals for the Tenth Circuit, this case arises within the jurisdiction of the United States Court of Appeals for the Ninth Circuit, as claimant's coal mine employment was in Arizona. *Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*); Director's Exhibits 1, 2, 4.

Section 718.204(b)(2). *See White*, 23 BLR at 1-3; Director's Exhibit 2. Claimant's filing of a request for modification in this case does not alter the requisite analysis under Section 725.309. 20 C.F.R. §725.309(d); *see also Hess v. Director, OWCP*, 21 BLR 1-141, 1-143 (1998); *Rice v. Sahara Coal Co.*, 15 BLR 1-19 (1991)(*en banc*).

Because we have affirmed, as unchallenged on appeal, the administrative law judge's determination that claimant did not establish total disability under Section 718.204(b)(2)(i)-(iv), *supra* at 2 n.2, we need only address the administrative law judge's findings regarding invocation of the irrebuttable presumption of total disability due to pneumoconiosis at Section 718.304. Section 411(c)(3)(A) of the Act, 30 U.S.C. §921(c)(1), as 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, (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)(A)-(C); 20 C.F.R. §718.304(a)-(c). The introduction of legally sufficient evidence of complicated pneumoconiosis does not automatically qualify a claimant for the irrebuttable presumption. The administrative law judge must weigh together all of the evidence relevant to the presence or absence of complicated pneumoconiosis and determine whether the claimant has established the presence of complicated pneumoconiosis by a preponderance of the evidence. *Melnick v. Consolidation Coal Co.*, 16 BLR 1-31, 1-33-34 (1991)(*en banc*).

The administrative law judge found that, in the prior claim, the evidence demonstrated the presence of large masses in claimant's lungs, but was insufficient to prove that these masses were complicated pneumoconiosis. Decision and Order at 4. The administrative law judge stated:

> [T]o meet the threshold determination under [Section] 725.309 in this claim, newly submitted medical evidence must reveal some change, worsening, or progression of the miner's respiratory condition. Additional chest x-ray evidence of large masses will be insufficient. Rather, the x-ray evidence will need to demonstrate that there are more masses, or more nodules, or larger masses in the miner's lungs than were present in the first claim in order to meet the threshold requirement. . . .
>
> The threshold requirement cannot be met by evidence only addressing the cause of the large opacities observed in the miner's original claim without a concomitant change in the size or number of those opacities.

Id. at 4-5. Pursuant to Section 718.304(a), the administrative law judge found that Dr. Gatenby's statement, that the newly submitted x-ray dated January 28, 2003, contained findings "typical of progressive massive fibrosis in pneumoconiosis," was insufficient to

demonstrate a change in conditions, as his reading was "unchanged" from his interpretation of a film considered in the prior, denied claim. Decision and Order at 8. The administrative law judge further determined that the readings of the newly submitted May 25, 2004 x-ray were in equipoise as to the existence of complicated pneumoconiosis and that this film did not support a finding of complicated pneumoconiosis, because "it does not identify new masses, larger masses, or more nodules since the studies submitted in conjunction with the miner's claim."[5] *Id.* The administrative law judge similarly found that the June 2, 2004 digital x-ray and CT-scan interpretations are insufficient to meet claimant's threshold burden under Section 718.304(c), as the conflicting evidence:

> [Does] not yield findings of change from studies conducted in connection with the miner's first claim. Namely, the nodules and large lesions were identified by experts in the first claim and it was determined that these nodules and lesions were not attributable to coal dust exposure . . . . [U]nder [Section] 725.309, this tribunal is without authority to conduct a "mistake in a determination of fact" analysis that would have been available under 20 C.F.R. §725.310. Because the June 2004 studies did not produce observations of new or changed nodules or masses, reconsideration as to the cause of the nodules or masses already observed in the first claim is precluded here.

Decision and Order at 10. The administrative law judge also found that, because the medical opinion evidence did not identify new nodules or masses, or pre-existing masses that have grown larger, he was "barred from allowing re-litigation of the cause of development of the large masses present since the miner's first claim." *Id*. at 18.

Claimant maintains that the administrative law judge erred in determining that under Section 725.309(d), claimant was required to establish, by qualitatively different evidence, that his condition had worsened since the denial of his prior claim. Claimant argues, in the alternative, that the administrative law judge did not make a specific comparison of the evidence from the prior claim to the newly submitted evidence.

Claimant's allegation of error regarding the administrative law judge's interpretation of Section 725.309 has merit. In amending Section 725.309, the Department of Labor adopted the standard set forth in *Lisa Lee Mines v. Director, OWCP* [*Rutter*], 86 F.3d 1358, 20 BLR 2-227 (4th Cir. 1996)(*en banc*), *rev'g* 57 F.3d 402, 19

[5] The administrative law judge identified May 24, 2004, as the date of the x-rays read by Drs. James and Repsher. Decision and Order at 7. Dr. James, in his June 1, 2004 medical report, referred to an x-ray dated May 24, 2004, as one of the diagnostic tests that he considered. Director's Exhibit 41. The ILO forms submitted by Drs. James and Repsher reflect a date of May 25, 2004. Director's Exhibit 41; Employer's Exhibit 6.

BLR 2-223 (4th Cir. 1995), which did not require a qualitative comparison of the old and new evidence. 65 Fed. Reg. 79968 (Dec. 20, 2000). Under the revised version of Section 725.309, therefore, claimant can demonstrate the requisite change in an applicable condition of entitlement by establishing, through evidence developed subsequent to the prior denial, at least one of the elements of entitlement that was adjudicated against him. *See* 20 C.F.R. §725.309(d)(2), (3); *Dempsey v. Sewell Coal Co.*, 23 BLR 1-47, 1-64 (2004)(*en banc*). There is no separate requirement that claimant submit qualitatively different evidence. We vacate, therefore, the administrative law judge's finding that claimant was required to establish the presence of new large nodules or masses or that the pre-existing masses have grown larger, to establish the existence of complicated pneumoconiosis pursuant to Section 718.304, and a change in an applicable condition of entitlement pursuant to Section 725.309. We remand this case to the administrative law judge for reconsideration of whether claimant has satisfied the requirements of Section 725.309 by proving that he has complicated pneumoconiosis at Section 718.304. *See White*, 23 BLR at 1-3.

With respect to the administrative law judge's consideration of the x-ray evidence under Section 718.304(a), claimant correctly asserts that, although the administrative law judge included Dr. James's reading of the January 14, 2005 film in his summary of the newly submitted evidence, he did not address it under Section 718.304(a). Decision and Order at 7, 8. Claimant is also correct in maintaining that the administrative law judge did not consider whether employer's concession, that the biopsy evidence establishes the existence of simple pneumoconiosis, affects the weight to which the x-ray interpretations of Drs. Repsher and Castle, who concluded that claimant does not have any form of the disease, are entitled at Section 718.304(a). Accordingly, on remand, the administrative law judge must consider Dr. James's reading of the film dated January 14, 2005 and must address the conflict between the administrative law judge's finding of pneumoconiosis and the x-ray readings of Drs. Repsher and Castle at Section 718.304(a). *Melnick*, 16 BLR at 1-33-34.

Pursuant to Section 718.304(c), claimant argues that the administrative law judge erred in giving more weight to the negative interpretations of the digital x-ray and CT scan dated June 2, 2004, by Drs. Repsher and Castle, both of whom are B readers, over the positive interpretation by Dr. Orbelo, who is a Board-certified radiologist. Decision and Order at 11; Director's Exhibit 18; Claimant's Exhibit 1b; Employer's Exhibit 3 at 95. Claimant asserts that, as a Board-certified radiologist, Dr. Orbelo is the only physician qualified to interpret digital x-rays or CT scans. Claimant's allegation of error is without merit, as claimant has not identified any evidence in support of his assertion that a Board-certified radiologist is singularly qualified to read digital x-rays and CT scans for pneumoconiosis.

Claimant is correct, however, in asserting that, other than the administrative law judge's improper reliance upon the fact that the physicians described opacities and

nodules that were similar to those observed in the prior claim, the administrative law judge did not explain how he resolved the conflict in the readings of the digital x-ray and the CT scan. The Administrative Procedure Act (APA) requires that every adjudicatory decision 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 in 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), *see Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162, 1-165 (1989). Because the administrative law judge did not identify the basis for his decision to give more weight to the negative interpretations under Section 718.304(c), we vacate the administrative law judge's determination that the digital x-ray and CT scan evidence do not support a finding of complicated pneumoconiosis. On remand, the administrative law judge must reconsider this evidence and set forth his findings in detail, including the underlying rationale, in accordance with the APA. *Id*.

With respect to the medical opinion evidence, the administrative law judge determined, pursuant to Section 718.304(c):

> Of the physicians offering medical opinions, Drs. Klepper and James diagnose the presence of complicated coal workers' pneumoconiosis whereas Drs. Castle and Repsher observed large masses in the miner's lungs that were not coal dust related. While Dr. James offered a compelling rationale for his diagnosis of complicated pneumoconiosis, including biopsy evidence and multiple negative tuberculosis tests, the problem remains that he relied on biopsy evidence and tuberculosis testing developed at the time of the miner's first claim.

Decision and Order at 18. Claimant maintains that the administrative law judge erred in discrediting Dr. James's medical opinion under Section 718.304(c) on the ground that he relied on biopsy evidence and the results of tuberculosis testing submitted in the first claim. Claimant's contention has merit.

Dr. James examined claimant on May 25, 2004 and prepared reports dated June 1, 2004, August 24, 2007 and February 15, 2008. Director's Exhibit 41. In his June 1, 2004 report, Dr. James diagnosed complicated pneumoconiosis, based on a chest x-ray, pulmonary function study, blood gas test and treadmill test. *Id.* Dr. James also referred to, and attached, a History and Physical Report that he prepared on May 25, 2004, in which he reviewed treatment records from Kayenta Clinic that included biopsy evidence and the results of tuberculosis testing performed before, or in conjunction with, the adjudication of claimant's first claim. *Id*. In his February 15, 2008 report, Dr. James considered additional medical evidence, including Dr. Repsher's July 1, 2004 report, Dr. Rohren's interpretation of the May 25, 2004 x-ray and Dr. Orbelo's interpretations of the June 2, 2004 digital x-ray and CT scan. Claimant's Exhibit 1. Dr. James reiterated his

own determination that the May 25, 2004 x-ray did not reflect calcification of the lymph nodes and noted that Dr. Rohren made the same finding.[6] *Id.* Dr. James further indicated that Dr. Orbelo did not detect calcification of the lymph nodes or "cavitation to suggest superimposed tuberculosis," on the June 2, 2004 digital x-ray and CT scan.[7] *Id.*

Contrary to the administrative law judge's finding, therefore, Dr. James diagnosed complicated pneumoconiosis, based on more than "biopsy evidence and tuberculosis testing developed at the miner's first claim." Decision and Order at 18. Dr. James relied on his May 2004 examination and diagnostic testing, treatment records from 2002-2005, radiographic evidence obtained after the denial of the first claim in 2001, including the readings of Drs. Orbelo and Rohren and claimant's prior medical history. Director's Exhibit 41; Claimant's Exhibit 1. Thus, Dr. James's reference to the 1995 biopsy and tuberculosis test results supported his ultimate conclusion, that claimant had complicated pneumoconiosis, but did not provide the sole basis for his opinion. We vacate, therefore, the administrative law judge's finding that Dr. James's opinion was insufficient to establish the existence of complicated pneumoconiosis. On remand, the administrative law judge must reconsider the medical opinion evidence pursuant to Section 718.304(c) and determine whether the opinions are reasoned and documented, taking into account the quality of the physicians' reasoning and their qualifications, including Dr. James's status as claimant's treating physician. 20 C.F.R. 718.104(d); *see Collins v. J & L Steel*, 21 BLR 1-181 (1999); *Trumbo v. Reading Anthracite Coal Co.*, 17 BLR 1-85 (1995); *Tedesco v. Director, OWCP*, 18 BLR 1-103 (1994); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*).

In sum, on remand, the administrative law judge must first determine whether the relevant evidence in each category under Section 718.304(a) and (c) tends to establish the presence of complicated pneumoconiosis, and then he must weigh the evidence together before determining whether it is sufficient to establish invocation of the irrebuttable presumption of total disability due to pneumoconiosis at Section 718.304 and, therefore,

---

[6] Dr. Rohren diagnosed "conglomerate areas of parenchymal opacitation within the upper lobes superimposed on interstitial reticular nodular prominence . . . compatible with progressive massive fibrosis related either to coal workers' pneumoconiosis or silicosis . . . no evidence of cavitation within either upper lobe." Employer's Exhibit 3.

[7] Dr. Orbelo reported that the June 2, 2004 CT scan revealed "[m]ultiple small pulmonary nodules and irregular upper lobe masses suggestive of silicosis or coal workers' pneumoconiosis with progressive massive fibrosis . . . . No cavitation to suggest superimposed tuberculosis." Claimant's Exhibit 1. Dr. Orbelo reported that the June 2, 2004 digital x-ray revealed "noncalcified ill-defined nodules . . . silicosis or coal workers' pneumoconiosis with progressive massive fibrosis." *Id.*

a change in an applicable condition of entitlement at Section 725.309(d). *See White*, 23 BLR at 1-3; *Melnick*, 16 BLR at 1-33.

Accordingly, the administrative law judge's Decision and Order Denying Living Miner's Benefits is affirmed in part, vacated in part and the case is remanded for further consideration consistent with this opinion.

SO ORDERED.

_____
NANCY S. DOLDER, Chief
Administrative Appeals Judge

_____
ROY P. SMITH
Administrative Appeals Judge

_____
JUDITH S. BOGGS
Administrative Appeals Judge