BRB No. 09-0783 BLA

BILLY R. BARTLEY	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	DATE ISSUED: 08/31/2010
	)	
SOUTH AKERS MINING COMPANY	)	
	)	
and	)	
	)	
KENTUCKY EMPLOYERS MUTUAL INSURANCE	)	
	)	
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-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.

James W. Herald (Jones, Walters, Turner & Shelton PLLC), Pikeville, Kentucky, for employer.

Michelle S. Gerdano (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 McGRANERY, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order-Awarding Benefits (06-BLA-6014) of Administrative Law Judge Kenneth A. Krantz rendered 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). Claimant filed his claim for benefits on June 10, 2004. Director's Exhibit 2. The district director denied benefits on January 25, 2005, finding that, although claimant established that he had simple pneumoconiosis, he did not establish that he was totally disabled. Director's Exhibit 32 at 4.

Three months after the district director's decision was issued, claimant was examined by Dr. Forehand, who diagnosed him with complicated pneumoconiosis arising out of coal mine employment. Director's Exhibit 33 at 4-7. Claimant timely requested modification of the denial of his claim, and submitted Dr. Forehand's report. Director's Exhibit 33; *see* 20 C.F.R. §725.310. Following the submission of additional evidence by employer, the district director found that the evidence established the existence of complicated pneumoconiosis, thereby invoking the irrebuttable presumption of total disability due to pneumoconiosis, set forth at 20 C.F.R. §718.304. Director's Exhibit 42. Finding that there was a change in conditions since the earlier denial, the district director granted modification and awarded benefits. *Id.* Employer requested a hearing.

The administrative law judge credited claimant with thirty-five years of coal mine employment, as stipulated,[1] and found that the weight of the medical evidence established the existence of complicated pneumoconiosis, entitling claimant to the irrebuttable presumption of total disability due to pneumoconiosis, set forth at 20 C.F.R. §718.304. The administrative law judge further found that claimant's complicated pneumoconiosis arose out of coal mine employment, pursuant to 20 C.F.R. §718.203(b). Accordingly, the administrative law judge awarded benefits, commencing as of April 2005, the month in which claimant's complicated pneumoconiosis was diagnosed.

On appeal, employer contends that the administrative law judge erred in permitting claimant to submit evidence in excess of the evidentiary limitations of 20 C.F.R. §§725.414 and 725.310(b). Employer further asserts that the administrative law judge erred in his analysis of the x-ray evidence when he found that it established

[1] The Board will apply the law of the United States Court of Appeals for the Sixth Circuit, as claimant was last employed in the coal mining industry in Kentucky. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989)(*en banc*); Director's Exhibit 6.

complicated pneumoconiosis pursuant to 20 C.F.R. §718.304(a).[2] Claimant responds in support of the administrative law judge's award of benefits. The Director, Office of Workers' Compensation Programs (the Director), declined to file a substantive response brief.[3] Employer has filed a reply brief, reiterating its contentions.

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). The Board reviews the administrative law judge's procedural rulings for abuse of discretion. *See Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-153 (1989)(*en banc*).

Employer argues that the "administrative law judge erred in permitting claimant to exceed [the] evidentiary limitations for a modification proceeding," set forth in 20 C.F.R. §§725.414 and 725.310(b).[4] Employer's Brief at 7. Employer's argument lacks merit.

---

[2] Employer does not challenge the administrative law judge's findings that the weight of the CT scan evidence supported a finding of complicated pneumoconiosis, and that the medical opinion evidence did "not serve to refute the existence of [the] more advanced form of pneumoconiosis," pursuant to 20 C.F.R. §718.304(c). Decision and Order at 9. Further, employer does not challenge the administrative law judge's finding that claimant's complicated pneumoconiosis arose out of coal mine employment pursuant to 20 C.F.R. §718.203(b), or his finding regarding the date for the commencement of benefits, pursuant to 20 C.F.R. §725.503. All of those findings are, therefore, affirmed. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

[3] In a footnote to his letter, the Director, Office of Workers' Compensation Programs, correctly states that this case is not affected by the recent amendments to the Black Lung Benefits Act, which became effective on March 23, 2010, because it involves a claim that was filed before January 1, 2005.

[4] Section 725.414 provides, in pertinent part, that each party may submit two x-ray readings, one autopsy report, one biopsy report, two pulmonary function studies, two blood gas studies, and two medical reports as its affirmative-case evidence. 20 C.F.R. §725.414(a)(2)(i), (a)(3)(i). Each party may then submit, in rebuttal, one physician's interpretation of each x-ray reading, autopsy report, biopsy report, pulmonary function study, and blood gas study submitted as the opposing party's affirmative case. 20 C.F.R. §725.414(a)(2)(ii), (a)(3)(ii). Following rebuttal, the party that originally proffered the evidence may submit certain rehabilitative evidence. *Id.* Further, 20 C.F.R. §725.310(b) provides that, in a modification proceeding, each party shall be entitled to submit one additional x-ray interpretation, pulmonary function study, blood gas study, and medical

Sections 725.414 and 725.310(b) "should be read together to establish combined evidentiary limits on modification, to allow a party to submit for the first time in a modification proceeding all of the evidence permitted by each regulation." *Rose v. Buffalo Mining Co.*, 23 BLR 1-221, 1-227 (2007). Therefore:

> [W]here a petition for modification is filed on a claim arising under the amended regulations, each party may submit its full complement of medical evidence allowed by 20 C.F.R. §725.414, *i.e.*, additional evidence to the extent the evidence already submitted in the claim proceedings is less than the full complement allowed, plus the party may also submit the additional medical evidence allowed by 20 C.F.R. §725.310(b).

Rose, 23 BLR at 1-228.

In this case, the administrative law judge properly applied the evidentiary limitations. The administrative law judge ordered the parties to designate their evidence clearly, so that he could determine whether each party's evidence fit within the positions available for "the medical evidence that it actually did or could have submitted [i]n the original claim [proceedings], plus one each of the four additional categories of medical evidence enumerated in Section 725.310." Scheduling Order, June 18, 2008, at 2-3. Following the parties' designation of their respective items of evidence, the administrative law judge admitted and excluded certain items of evidence, accordingly. Decision and Order at 3 n.4. A review of the record reveals that each piece of claimant's evidence considered by the administrative law judge was within the evidentiary limitations.[5] Thus, there is no merit to employer's contention that the administrative law judge reviewed excess evidence from claimant. *See Rose*, 23 BLR at 1-228. We, therefore, reject employer's evidentiary argument, and turn to the administrative law judge's findings on the merits.

---

report as affirmative-case evidence, "along with such rebuttal evidence and additional statements as are authorized by paragraphs (a)(2)(ii) and (a)(3)(ii) of §725.414." 20 C.F.R. §725.310(b). "Good cause" is required to exceed the numerical limits. 20 C.F.R. §725.456(b)(1).

[5] Employer does not specify which items of claimant's evidence it believes exceeded the limitations. With respect to the x-ray evidence, the only type of evidence that employer argues was not properly weighed by the administrative law judge, the record reflects that claimant submitted three affirmative-case x-ray readings, as he was permitted to do under 20 C.F.R. §§725.414(a)(2)(i) and 725.310(b). Director's Exhibit 33; Claimant's Exhibits 1, 2. He submitted no rebuttal x-ray readings.

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. Section 411(c)(3) of the Act, 30 U.S.C. §921(c)(3), implemented by Section 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 that would yield results equivalent to (A) or (B). 30 U.S.C. §921(c)(3); 20 C.F.R. §718.304. 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. *Gray v. SLC Coal Co.*, 176 F.3d 382, 389-90, 21 BLR 2-615, 2-628-29 (6th Cir. 1999); *Melnick v. Consolidation Coal Co.*, 16 BLR 1-31, 1-33 (1991)(*en banc*). The evidence that was submitted in this case consisted of x-rays, CT scans, and medical opinions.

Pursuant to Section 718.304(a), the administrative law judge considered nine readings of six x-rays. The two earliest x-rays, taken on August 2, and August 21, 2004, were interpreted by qualified readers as positive for simple pneumoconiosis, but as negative for large opacities.[6] Turning to the x-rays that were submitted in connection with claimant's request for modification, the administrative law judge considered that Dr. Forehand, who was then qualified as an A reader, interpreted the April 26, 2005 x-ray as "2/3" for small opacities of simple pneumoconiosis, and as positive for Category A large opacities. Director's Exhibit 33 at 6. Dr. Wheeler, a Board-certified radiologist and B reader, classified the same x-ray as "2/1" for small opacities, and as negative for large opacities. Employer's Exhibit 2. Dr. Dahhan, a B reader, classified the December 19, 2005 x-ray as "2/3" for small opacities, and as negative for large opacities. Director's Exhibit 37 at 14. Thereafter, Dr. DePonte, a Board-certified radiologist and B reader, classified the January 20, 2007 x-ray as "2/3" for small opacities, and as positive for Category B large opacities. Claimant's Exhibit 1. By contrast, Dr. Wheeler interpreted the same x-ray as negative for small opacities of simple pneumoconiosis, and as negative

[6] Specifically, Dr. Baker, a B reader, classified the August 2, 2004 x-ray as "2/3" for small opacities of simple pneumoconiosis, but as "O," or negative, for large opacities. Director's Exhibit 10 at 11. Dr. Wheeler, a Board-certified radiologist and B reader, classified the same x-ray as "2/1" for small opacities, and as negative for large opacities. Employer's Exhibit 4. Dr. Dahhan, a B reader, classified the August 21, 2004 x-ray as "2/2" for small opacities, but as negative for large opacities. Director's Exhibit 9.

for large opacities. Employer's Exhibit 3. Lastly, Dr. Kendall, a B reader, classified the April 18, 2007 x-ray as "2/1" for small opacities, and as positive for Category A large opacities. Claimant's Exhibit 2.

After summarizing all of the x-ray readings, the administrative law judge noted that, "[i]t was Dr. Forehand's reading of the April 26, 2005 chest x-ray that presented the first evidence of the more advanced form of pneumoconiosis and prompted [c]laimant's modification request." Decision and Order at 6. He noted further that, "subsequent readings by Drs. DePonte and Kendall also reported evidence of the more advanced form of the disease. Contrary readings were offered by Drs. Dahhan and Wheeler." *Id.*

In view of Dr. Wheeler's radiological qualifications, the administrative law judge acknowledged that Dr. Wheeler's readings were "[a]rguably the most probative. . . ." Decision and Order at 6. The administrative law judge, however, found that Dr. Wheeler's negative readings were "problematic" for two reasons: First, the administrative law judge noted that Dr. Wheeler placed a "?" on the ILO classification form for the April 26, 2005 x-ray, which he classified as "2/1" for small opacities but negative for large opacities, but did not explain "why he entered the question mark on the form," or specify "what aspect of his diagnosis he was questioning." *Id.* Second, despite having read two earlier x-rays as "2/1," or positive, for small opacities of simple pneumoconiosis, when Dr. Wheeler read the January 20, 2007 x-ray, he indicated, without explanation, that he found no opacities of any size, consistent with pneumoconiosis. Employer's Exhibit 3. The administrative law judge found that this later reading "casts further doubt upon the credibility of Dr. Wheeler's readings as he is now not finding the existence of the simpler form of the disease, manifested by small opacities, which he identified twice before and which all other readers identified." Decision and Order at 6. The administrative law judge therefore found "the credibility of Dr. Wheeler's readings compromised by his inconsistent readings."[7] *Id.*

Further, the administrative law judge found that, although Dr. Dahhan read the December 19, 2005 x-ray as negative for large opacities, that negative x-ray was outweighed by the later x-ray of January 20, 2007, interpreted as positive for large opacities by Dr. DePonte, "a better qualified reader. . . ." Decision and Order at 6. Weighing the x-rays, the administrative law judge found that, while the two earlier x-rays reflected only simple pneumoconiosis, the "preponderance of the new chest x-ray evidence now establishes the existence of at least Category A large opacities" under Section 718.304(a). *Id.*

[7] Employer does not challenge the administrative law judge's determination that the credibility of Dr. Wheeler's x-ray readings was undermined by their unexplained, inconsistent nature. That determination is, therefore, affirmed. *Skrack*, 6 BLR at 1-711.

Employer argues that the administrative law judge erred in weighing only the x-ray evidence submitted on modification to find that claimant established invocation of the irrebutttable presumption of total disability due to pneumoconiosis. Employer's Brief at 5. Employer's argument lacks merit. The administrative law judge considered and weighed all of the x-ray readings that were submitted, differentiating between the readings of the two x-rays that were submitted in the initial proceedings, and the readings of the four x-rays that were submitted on modification. Decision and Order at 5-6.

Employer argues further that the administrative law judge did not explain how the x-ray evidence established complicated pneumoconiosis, with reference to the quantity and quality of the evidence. Employer's Brief at 5-7. We disagree. In considering the x-ray evidence, the administrative law judge took into account the readers' radiological qualifications. Decision and Order at 5-6. Further, the administrative law judge explained that, although Dr. Wheeler was highly qualified, the credibility of his negative readings was undermined. As noted earlier, employer does not challenge that finding on appeal. *See* n.7, *supra.* Further, the administrative law judge explained that the earlier x-rays, reflecting the presence of simple pneumoconiosis only, were "outweighed by the later evidence," demonstrating that claimant has now developed "the more advanced form of the disease" manifested by large opacities. Decision and Order at 9. This finding was both rational and consistent with "the 'later evidence' principle." *Woodward v. Director, OWCP*, 991 F.2d 314, 321, 17 BLR 2-77, 2-85 (6th Cir. 1993). Finally, employer notes that the April 26, 2005 x-ray, read as positive for large opacities by Dr. Forehand, had the "weakest" film quality of all the x-rays. Employer's Brief at 5. An x-ray is assumed to be of acceptable quality if it is read. *Auxier v. Director, OWCP*, 8 BLR 1-109, 1-111 (1985). Although Dr. Wheeler rated the April 26, 2005 x-ray as a "quality three" film, he read the x-ray. Thus, the administrative law judge rationally found that the quality of the April 26, 2005 x-ray did not affect the credibility of the readings. *See Auxier*, 8 BLR at 1-111; Decision and Order at 6 n.6.

In sum, the administrative law judge conducted a proper quantitative and qualitative evaluation of the x-ray evidence, and substantial evidence supports his findings. *See Staton v. Norfolk & Western Ry. Co.*, 65 F.3d 55, 59, 19 BLR 2-271, 2-279-80 (6th Cir. 1995); *Woodward*, 991 F.2d at 321, 17 BLR at 2-86. Therefore, having rejected the specific arguments raised by employer, we affirm the administrative law judge's finding that the preponderance of the x-ray evidence established the existence of large opacities pursuant to Section 718.304(a).

As employer raises no other allegations of error, we affirm the administrative law judge's finding that claimant established invocation of the irrebuttable presumption of total disability due to pneumoconiosis pursuant to Section 718.304. *See Gray*, 176 F.3d at 389-90, 21 BLR at 2-628-29; *Melnick*, 16 BLR at 1-33. Consequently, we affirm the award of benefits.

Accordingly, the administrative law judge's Decision and Order-Awarding Benefits is affirmed.

SO ORDERED.

_____
NANCY S. DOLDER, Chief
Administrative Appeals Judge

_____
ROY P. SMITH
Administrative Appeals Judge

_____
REGINA C. McGRANERY
Administrative Appeals Judge