BRB No. 08-0263 BLA

C.B. Claimant-Petitioner v. CUMBERLAND RIVER COAL COMPANY and UNDERWRITERS SAFETY & CLAIMS, INCORPORATED Employer/Carrier-Respondents DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	)	DATE ISSUED: 12/19/2008 DECISION and ORDER

Appeal of the Decision and Order Denying Benefits of Alan L. Bergstrom, Administrative Law Judge, United States Department of Labor.

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

Denise M. Davidson (Davidson & Associates), Hazard, Kentucky, 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: DOLDER, Chief Administrative Appeals Judge, SMITH and HALL, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order Denying Benefits (2006-BLA-05442) of Administrative Law Judge Alan L. Bergstrom rendered on a subsequent 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).[1] The administrative law judge initially found that claimant's subsequent claim was timely filed pursuant to 20 C.F.R. §725.308 and, based on the parties' stipulation, credited claimant with nineteen years of coal mine employment. Decision and Order at 5, 19; Hearing Transcript at 5. The administrative law judge considered the newly submitted evidence and found that it did not demonstrate that claimant was totally disabled pursuant to 20 C.F.R. §718.204(b). The administrative law judge further found that claimant was unable to establish total disability by invocation of the irrebuttable presumption at 20 C.F.R. §718.304. Thus, because the administrative law judge determined that claimant was not totally disabled, he found that claimant failed to establish a change in an applicable condition of entitlement, as required by 20 C.F.R. §725.309(d). Accordingly, the administrative law judge denied benefits.

On appeal, claimant contends that the administrative law judge erred in failing to find that he suffers from complicated pneumoconiosis pursuant to 20 C.F.R. §718.304. Employer responds, urging affirmance of the administrative law judge's denial of benefits. In a limited response, the Director, Office of Workers' Compensation Programs

[1] Claimant filed a prior claim for black lung benefits on March 24, 1994. Director's Exhibit 1. In a Decision and Order issued on October 24, 1996, Administrative Law Judge J. Michael O'Neil denied benefits on the grounds that the evidence was insufficient to establish the existence of pneumoconiosis or that claimant was totally disabled. *Id.* Claimant appealed to the Board, but his appeal was later dismissed as abandoned. [*C.B.*] *v. Cumberland River Coal Co.*, BRB No. 97-0401 BLA (Apr. 24, 1997) (Order). Claimant filed another claim on February 1, 2002. Director's Exhibit 2. On September 2, 2003, the district director issued a Proposed Decision and Order denying benefits, finding that while claimant suffered from pneumoconiosis, the evidence was insufficient to establish that he was totally disabled. *Id*. Claimant took no further action on the denial until he filed his current subsequent claim on February 1, 2005. Director's Exhibit 4. On November 14, 2005, the district director issued a Proposed Decision and Order awarding benefits. Director's Exhibit 33. Employer requested a hearing, which was held on January 17, 2007. The administrative law judge subsequently issued his Decision and Order Denying Benefits on November 15, 2007, which is the subject of this appeal.

(the Director), asserts that the administrative law judge improperly applied the "later evidence" rule in his consideration of the x-ray evidence.[2] Director's Brief at 2.

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.[3] 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 filed under 20 C.F.R. Part 718, claimant must establish that he suffers from pneumoconiosis, that his pneumoconiosis arose out of coal mine employment, and that he is totally disabled by pneumoconiosis. *See* 20 C.F.R. §§718.3, 718.202, 718.203, 718.204; *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 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.,* 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, claimant's prior claim was denied on the ground that he was not totally disabled. The administrative law judge considered the newly submitted evidence and found that it did not establish total disability. The administrative law judge also found that claimant was unable to establish total disability by invoking the irrebuttable presumption at 20 C.F.R. §718.304. Thus, the administrative law judge found that claimant failed to satisfy his burden under 20 C.F.R. §725.309(d).

Claimant argues on appeal that the administrative law judge erred in finding that he was not entitled to the irrebuttable presumption of total disability due to

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[2] We affirm the administrative law judge's findings that the claim was timely filed, that claimant established nineteen years of coal mine employment, and that the evidence failed to establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(i)-(iv) as they are unchallenged on appeal. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

[3] Because claimant's coal mine employment was in Kentucky, this case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (*en banc*); Director's Exhibit 3.

pneumoconiosis pursuant to 20 C.F.R. §718.304. Pursuant to 20 C.F.R. §718.304(a), claimant asserts that the administrative law judge erred in assigning greater weight to the more recent x-rays dated December 28, 2005 and February 23, 2006, which were negative for pneumoconiosis, over the contrary positive readings for complicated pneumoconiosis of earlier x-rays dated April 7, 2005 and August 11, 2005. Claimant contends that the administrative law judge erred in relying on the negative readings for complicated pneumoconiosis, and that he improperly credited a negative CT scan reading by Dr. Jarboe that is not of record. In addition, the Director argues that the administrative law judge improperly applied the "later evidence rule in his consideration of the x-ray evidence as to the existence of complicated pneumoconiosis." Director's Brief at 2. We do not find merit in these contentions.

Under Section 411(c)(3) of the Act, 30 U.S.C. §923(c)(3), and its implementing regulation, 20 C.F.R. §718.304, there is an irrebuttable presumption that a miner is totally disabled due to pneumoconiosis if (a) an x-ray of the miner's lungs shows an opacity greater than one centimeter that would be classified as Category A, B, or C; (b) a biopsy or autopsy shows massive lesions in the lung; or (c) when diagnosed by other means, the condition could reasonably be expected to reveal a result equivalent to (a) or (b).[4] *See* 20 C.F.R. §718.304.

In considering whether claimant establish the existence of complicated pneumoconiosis, the administrative law judge weighed the newly submitted x-ray evidence at 20 C.F.R. §718.304(a), which consists of seven readings of four x-rays dated April 7, 2005, August 11, 2005, December 28, 2005 and February 23, 2006. Decision and Order at 5-10; Director's Exhibits 13, 15, Claimant's Exhibit 1; Employer's Exhibits 1, 3, 5, 6. The April 7, 2005 x-ray was read as positive for simple and complicated pneumoconiosis (1/1, Category A large opacities) by Dr. Rasmussen, a B reader, as positive for simple and complicated pneumoconiosis (2/1, Category A large opacities) by Dr. Alexander , a Board-certified radiologist and B reader (dually qualified radiologist), and as negative for pneumoconiosis by Dr. Wheeler, a dually qualified radiologist.[5] Director's Exhibits 13, 15; Employer's Exhibit 1. The August 11, 2005 x-ray was read as positive for simple and complicated pneumoconiosis (1/2, Category A large opacities) by Dr. DePonte, a dually qualified radiologist, but as negative for pneumoconiosis by Dr. Wheeler. Claimant's Exhibit 1; Employer's Exhibit 6. The December 28, 2005 and

[4] The record does not contain any biopsy evidence relevant to the existence of complicated pneumoconiosis pursuant to 20 C.F.R. §718.304(b). Decision and Order at 18.

[5] Dr. Barrett also read the April 7, 2005 x-ray for quality purposes only. Director's Exhibit 14.

February 23, 2006 x-rays were each read as negative for pneumoconiosis (0/1, Category 0 large opacities) by Dr. Scott, a dually qualified radiologist. Employer's Exhibits 3, 5.

In weighing the conflicting x-ray evidence, the administrative law judge considered the credentials of the physicians and found that, overall, there were four negative and two positive readings for complicated pneumoconiosis by dually qualified radiologists. Decision and Order at 17. Furthermore, the administrative law judge noted that the "initial reports of complicated pneumoconiosis were based on chest x-rays from April 7, 2005 and August 11, 2005." *Id*. The administrative law judge noted that the April 7, 2005 and August 11, 2005 x-rays had conflicting readings for the presence or absence of complicated pneumoconiosis but that subsequent x-rays taken on December 25, 2005 and February 23, 2006 were negative for complicated pneumoconiosis. Decision and Order at 17-18. Thus, upon consideration of all of the x-ray evidence, the administrative law judge found that claimant failed to satisfy his burden of proving the existence of complicated pneumoconiosis by a preponderance of the evidence. Decision and Order at 18.

Contrary to the arguments presented by claimant and the Director in this appeal, we see no error in the administrative law judge's analysis of the x-ray evidence. Specifically, we disagree with the Director that the administrative law judge erroneously based his findings solely on the chronology of the evidence. Director's Brief at 2. Because the x-ray evidence in this case is close in time, the administrative law judge permissibly determined that the probative value of the positive readings for complicated pneumoconiosis of the April 7, 2005 and August 11, 2005 x-rays were called into question by the fact that: 1) these x-rays were also read as negative readings for complicated pneumoconiosis by dually qualified radiologists; and 2) there were two subsequent x-rays taken on December 28, 2005 and February 23, 2006, which were uniformly read as negative for complicated pneumoconiosis. Decision and Order at 17-18. Because the administrative law judge properly analyzed the quantity and quality of the x-ray evidence, taking into consideration the qualifications of the interpreting radiologists, we affirm his finding that claimant does not have a Category A large opacity. *Director, OWCP v. Greenwich Collieries* [*Ondecko*], 512 U.S. 267, 18 BLR 2A-1 (1994); *Woodward v. Director, OWCP*, 991 F.2d 314, 17 BLR 2-277 (6th Cir. 1993), *Dempsey v. Sewell Coal Corp.*, 23 BLR 1-47, 1-65 (2004) (*en banc*); *Cranor v. Peabody Coal Co.*, 22 BLR 1-1, 1-7 (1999) (*en banc recon.*); Decision and Order 18. Thus, we affirm, as supported by substantial evidence, the administrative law judge's finding that claimant failed to satisfy his burden to prove the existence of complicated pneumoconiosis pursuant to 20 C.F.R. §718.304(a).

We also affirm the administrative law judge's finding that claimant failed to establish the existence of complicated pneumoconiosis based on his consideration of the other evidence of record pursuant to 20 C.F.R. §718.304(c), which consists of progress

notes by claimant's treating physician, Dr. Jarboe, and the medical opinions of Drs. Rasmussen and Fino. Decision and Order at 18; Director's Exhibit 13; Claimant's Exhibit 2; Employer's Exhibit 4. As noted by the administrative law judge, Dr. Jarboe examined claimant on April 12, 2002 and indicated that a CT scan had been conducted which showed nodules consistent with simple coal workers' pneumoconiosis but not complicated pneumoconiosis. Claimant's Exhibit 2. Dr. Rasmussen examined claimant on behalf of the Department of Labor on April 7, 2005. Director's Exhibit 13. Dr. Rasmussen diagnosed complicated pneumoconiosis based on his interpretation of an x-ray and claimant's history of coal mine employment. *Id.* In contrast, Dr. Fino examined claimant on February 23, 2006, and opined that claimant's x-ray findings and his objective test results supported a finding of simple coal workers' pneumoconiosis. Employer's Exhibit 4.

The administrative law judge determined that "[a]lthough the CT scan upon which [Dr. Jarboe] relied was not made part of the record, [Dr. Jarboe] provided a logical explanation" as to why that CT scan did not reveal complicated pneumoconiosis. Decision and Order at 18. The administrative law judge stated that he placed "some weight on Dr. Jarboe's opinion," as it "bolsters" Dr. Fino's opinion that claimant has simple pneumoconiosis. *Id.* The administrative law judge determined that Dr. Fino's diagnosis of simple pneumoconiosis was reasoned and documented, and better supported by the objective evidence, than Dr. Rasmussen's contrary opinion that claimant has complicated pneumoconiosis. *Id.* Therefore, the administrative law judge found that claimant failed to establish the existence of complicated pneumoconiosis pursuant to 20 C.F.R. §718.304(c). *Id.*

Claimant contends that the administrative law judge erred in attributing weight to a CT scan that is not of record. Claimant's Brief at 6. However, contrary to claimant's assertion and the administrative law judge's finding, the record contains a radiology report of a CT scan taken on April 2, 2002, which was interpreted as showing interstitial lung infiltrates and some pulmonary nodules measuring less than 5 millimeters in size. Director's Exhibit 2-125. Although the April 2, 2002 CT scan referenced by Dr. Jarboe was not specifically designated by the parties pursuant to 20 C.F.R. §725.414, because it was made a part of the record in the prior miner's claim, it automatically became part of the evidentiary record in the subsequent claim. S*ee* 20 C.F.R. §725.414; 725.309. Thus, we reject claimant's argument that the administrative law judge erred in considering the negative CT scan for complicated pneumoconiosis in his consideration of evidence at 20 C.F.R. 20 C.F.R. §718.304(c). Because claimant does not raise any further challenge with respect to the administrative law judge's findings at 20 C.F.R. §718.304(c), they are affirmed. *Cox v. Benefits Review Board*, 791 F.2d 445, 9 BLR 2-46 (6th Cir. 1986); *Sarf v. Director, OWCP*, 10 BLR 1-119 (1987); *Fish v. Director, OWCP*, 6 BLR 1-107 (1983).

To summarize, contrary to claimant's argument, the introduction of legally sufficient evidence of complicated pneumoconiosis does not automatically qualify claimant for the irrebuttable presumption. The administrative law judge is required to weigh all of the relevant evidence at 20 C.F.R. §718.304(a)-(c), including evidence of simple and complicated pneumoconiosis, as well as evidence of no pneumoconiosis, and to resolve any conflicts and make findings of fact. *See Braenovich v. Cannelton Industries, Inc./Cypress Amax*, 22 BLR 1-236, 1-245 (2003). Because the administrative law judge properly weighed all of the relevant evidence and permissibly exercised his discretion in finding that claimant does not have complicated pneumoconiosis, we affirm the administrative law judge's finding that claimant is not entitled to the irrebuttable presumption of total disability due to pneumoconiosis pursuant to 20 C.F.R. §718.304 and further affirm the denial of benefits.

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

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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BETTY JEAN HALL
Administrative Appeals Judge