BRB No. 12-0169 BLA

ALLEN W. ANDERSON	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
AMERICAN ENERGY, LLC	)	DATE ISSUED: 12/21/2012
	)	
and	)	
	)	
ROCKWOOD CASUALTY INSURANCE 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 Awarding Benefits of Linda S. Chapman, Administrative Law Judge, United States Department of Labor.

John R. Sigmond (Penn, Stuart & Eskridge), Bristol, Virginia, for employer/carrier.

Before: DOLDER, Chief Administrative Appeals Judge, McGRANERY and HALL, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order Awarding Benefits (2010-BLA-5416) of Administrative Law Judge Linda S. Chapman, rendered on a subsequent claim filed on June 9, 2009,[1] pursuant to the provisions of the Black Lung Benefits Act, as amended 30

[1] Claimant filed an initial claim for benefits on May 20, 1998, which was denied by the district director by reason of abandonment. Director's Exhibit 1. Claimant filed a

U.S.C. §§901-944 (Supp. 2011) (the Act). In a Decision and Order dated November 21, 2011, the administrative law judge credited claimant with at least eighteen years of coal mine employment and adjudicated this claim pursuant to the regulations at 20 C.F.R. Part 718. The administrative law judge initially found that claimant failed to establish the existence of simple pneumoconiosis, based on the newly submitted evidence, pursuant to 20 C.F.R. §718.202(a). The administrative law judge, however, found that the newly submitted evidence was sufficient to establish that claimant has complicated pneumoconiosis and, thus, found that claimant demonstrated a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309. Based on her review of the entire record, the administrative law judge found that claimant invoked the irrebuttable presumption of total disability due to pneumoconiosis at 20 C.F.R. §718.304. Accordingly, the administrative law judge awarded benefits.

On appeal, employer asserts that the administrative law judge erred in weighing the x-rays, CT scans and medical opinions relevant to whether claimant suffers from complicated pneumoconiosis. Employer asserts that the CT scans do not support a finding of complicated pneumoconiosis, as there is no equivalency determination. Employer also argues that the administrative law judge erred in crediting medical opinions diagnosing complicated pneumoconiosis that were in conflict with her findings as to the existence of simple pneumoconiosis. Claimant has not filed a response brief. The Director, Office of Workers' Compensation Programs, has declined to file a substantive response, unless specifically requested to do so by the Board.

The Board's scope of review is defined by statute. The administrative law judge's Decision and Order must be affirmed if it is supported by substantial evidence, is rational, and is in accordance with applicable law.[2] 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).

When 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

---

second claim for benefits on July 27, 2007, which was denied by the district director on April 21, 2008, because the evidence was insufficient to establish any of the elements of entitlement. Director's Exhibit 2. Claimant took no further action until he filed the current subsequent claim. Director's Exhibit 4.

[2] Because claimant's last coal mine employment was in Virginia, the Board will apply the law of the United States Court of Appeals for the Fourth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Director's Exhibit 5.

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); *see 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 for failure to establish any of the requisite elements of entitlement.[3] Thus, claimant had to establish, based on the newly submitted evidence, at least one of the requisite elements of entitlement in order to satisfy his burden of proof at 20 C.F.R. §725.309(d), and obtain a review of his claim on the merits. *See White*, 23 BLR at 1-3.

The administrative law judge found that claimant established a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309 because he invoked the irrebuttable presumption of total disability due to pneumoconiosis at 20 C.F.R. §718.304. Section 411(c)(3) of the Act, 30 U.S.C. §921(c)(3), as implemented by 20 C.F.R. §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, yields massive lesions in the lung;[4] 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); 20 C.F.R. §718.304.

The introduction of legally sufficient evidence of complicated pneumoconiosis does not, however, automatically invoke the irrebuttable presumption found at 20 C.F.R. §718.304. The administrative law judge must examine all the evidence on this issue, i.e., evidence of simple and complicated pneumoconiosis, as well as evidence of no pneumoconiosis, resolve any conflicts, and make a finding of fact. *See Westmoreland Coal Co. v. Cox*, 602 F.3d 276, 24 BLR 2-269 (4th Cir. 2010); *Director, OWCP v. Eastern Coal Corp.* [*Scarbro*], 220 F.3d 250, 22 BLR 2-93 (4th Cir. 2000); *Lester v. Director, OWCP*, 993 F.2d 1143, 1145-46, 17 BLR 2-114, 2-117-18 (4th Cir. 1993);

[3] In order to establish entitlement to benefits in a living miner's claim pursuant to 20 C.F.R. Part 718, claimant must prove that he suffers from pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, that he is totally disabled and that his disability is due to pneumoconiosis. *See* 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure to establish any one of these elements precludes a finding of entitlement. *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986) (en banc).

[4] The record contains no biopsy evidence pursuant to 20 C.F.R. 718.304(b).

Melnick v. Consolidation Coal Co., 16 BLR 1-31, 1-33-34 (1991) (*en banc*); *Truitt v. North American Coal Corp.*, 2 BLR 1-199 (1979).

Relevant to 20 C.F.R. §718.304(a), the administrative law judge noted that the record contained eleven readings of three x-rays dated August 25, 2008, April 22, 2009 and July 14, 2009. Decision and Order at 4-7. The August 25, 2008 x-ray was read as positive for simple and complicated pneumoconiosis, Category B, by Dr. Miller, dually qualified as a Board-certified radiologist and B reader, and as positive for simple and complicated pneumoconiosis, Category A, by Dr. Alexander, also dually qualified. Director's Exhibit 13; Claimant's Exhibit 6. The same x-ray was read as negative for pneumoconiosis by Dr. Wheeler, also dually qualified. Director's Exhibit 15. In the "Comments" section of the ILO form, Dr. Wheeler identified a six centimeter mass in the right lung and a two centimeter mass in the left lung, compatible with granulomatous disease, histoplasmosis or mycobacterium avium complex more likely than tuberculosis. *Id*. The April 22, 2009 x-ray was read as positive for simple and complicated pneumoconiosis, Category A, by Dr. Alexander, but as negative for pneumoconiosis by Dr. Wheeler. Director's Exhibits 13, 15. In the "Comments" section of the ILO form, Dr. Wheeler again identified the six centimeter and two centimeter masses in claimant's lungs, which he believed were compatible with "granulomatous disease, histoplasmosis more likely than tuberculosis." Director's Exhibit 15. The July 14, 2009 x-ray was read as positive for simple and complicated pneumoconiosis, Category A, by Dr. Groten, a dually qualified radiologist and by Dr. Alexander. Claimant's Exhibits 1, 5. Dr. Forehand, a B reader, read this x-ray as positive for simple and complicated pneumoconiosis, Category B, while Drs. Scatarige and Scott, both dually qualified, read the x-ray as negative for pneumoconiosis. Director's Exhibits 14, 15. In the "Comments" section of the ILO form, Dr. Scott identified the presence of ill-defined infiltrates in the central right and upper left lung compatible with tuberculosis, histoplasmosis, or sarcoidosis. Director's Exhibit 15. Dr. Ranavaya read this x-ray for quality purposes only. Director's Exhibit 14.

Relevant to 20 C.F.R. §718.304(c), the administrative law judge noted that the record included digital x-ray readings, CT scan readings, and medical opinions. Dr. Fino administered a digital x-ray on August 27, 2009, which was read by Dr. Wheeler as showing "possible" nodules of simple pneumoconiosis and a five centimeter mass in the lower right lung, "compatible with granulomatous disease, histoplasmosis or mycobacterium avium complex more likely than tuberculosis." Director's Exhibit 12. Dr. Wheeler opined that the mass was not a large opacity of pneumoconiosis based on its location and because claimant was "quite young." Director's Exhibit 12. Dr. Wheeler indicated that a diagnosis could be made easily with a biopsy or microbiology. *Id*. Dr. Miller also reviewed the digital x-ray and reported a two centimeter large opacity, Category A, compatible with complicated pneumoconiosis.

The administrative law judge considered the results of three CT scans. Dr. Wheeler read a July 16, 2004 CT scan and reported that it showed no pneumoconiosis. Employer's Exhibit 3. However, he described a mass in the posterior inferior right upper lung, compatible with conglomerate tuberculosis or histoplasmosis. Employer's Exhibit 3. Dr. Wheeler reiterated his opinion that the mass in the right upper lung was not a large opacity for pneumoconiosis because claimant was young and because only a few small nodules were near it. *Id*. Dr. Scott read a February 4, 2005 CT scan and identified a six centimeter mass in the right upper lung, which he opined was compatible with granulomatous tuberculosis. Employer's Exhibit 4. Dr. Scott also identified masses in the left and right upper lung, which he opined were "probably granulomatous." *Id*. Dr. Scatarige read a July 28, 2006 CT scan and reported a large dense mass in the right upper lung. His differential diagnoses included cancer, tuberculosis or histoplasmosis. Employer's Exhibit 5.

The administrative law judge also considered treatment records and medical opinions submitted by the parties, relevant to 20 C.F.R. §718.304(c). Decision and Order at 9-10. The administrative law judge noted that claimant was treated at Stone Mountain Health Services by Drs. Anderson and Robinette for follow-up in connection with underlying coal workers' pneumoconiosis and a large mass present in the right upper lung since 2003, which was believed to be progressive massive fibrosis. *See* Decision and Order at 10-11; Director's Exhibit 13. The administrative law judge also noted that, on January 4, 2010 and January 17, 2011, claimant had "tuberculin P.P.D." tests that were negative for the disease. Decision and Order at 11; *see* Claimant's Exhibits 3, 4.

As noted by the administrative law judge, claimant was examined by Dr. Forehand on September 27, 2007, at the request of the Department of Labor. Decision and Order at 9; Director's Exhibit 11. Dr. Forehand opined, based on a chest x-ray, claimant's symptoms of shortness of breath, and the physical findings on examination, that claimant had coal workers' pneumoconiosis with progressive massive fibrosis. Director's Exhibit 11. Dr. Hippensteel examined claimant, on March 12, 2008, and reviewed certain medical records. Director's Exhibit 2. Citing the normal pulmonary function and arterial blood gas study results, Dr. Hippensteel opined that claimant did not have complicated pneumoconiosis. *Id*. He further opined that granulomatous disease with conglomerate lesions was the most probable cause of claimant's significant x-ray abnormalities. *Id*.

Dr. Fino also examined claimant, on August 27, 2009, and reviewed certain medical records. Director's Exhibit 12. Dr. Fino noted that Dr. Robinette identified a 5.9 by 3.4 centimeter mass on an August 5, 2005 CT scan, but Dr. Fino did not personally review the CT scan. *Id*. Dr. Fino opined that the mass, if present, was not complicated pneumoconiosis because claimant had no impairment in lung function. *Id.*

In weighing the evidence, the administrative law judge observed that, in accordance with the guidelines set forth by the United States Court of Appeals for the Fourth Circuit in *Cox* and *Scarbro*, she was required to consider whether the evidence, as a whole, indicates a condition of such severity that it would produce opacities greater than one centimeter in diameter on an x-ray, and whether these opacities are due to pneumoconiosis. Decision and Order at 14. The administrative law judge found that "the evidence in this claim overwhelmingly establishes that [c]laimant has masses in his lungs that appear on x-ray as opacities greater than one centimeter" and that "[t]he dispute centers on their etiology, with Dr. Wheeler, Dr. Scott and Dr. Scatarige attributing them to some sort of granulomatous disease." *Id*.

Addressing the etiology of the masses, the administrative law judge assigned little weight to the opinions of Drs. Wheeler, Scott and Scatarige, that claimant's lung condition is caused by an alternative lung disease, since there was "nothing in the record to suggest that [claimant] ever suffered from or [has] been exposed to tuberculosis, histoplasmosis, or other granulomatous diseases." Decision and Order at 15. The administrative law judge specifically noted that "tuberculin P.P.D" testing in January 2010 and January 2011 was negative. *Id*. The administrative law judge further found that "neither Dr. Wheeler nor any other [e]mployer physician has explained why a finding of a granulomatous disease necessarily rules out co-existing complicated pneumoconiosis." *Id*. The administrative law judge stated:

> In [claimant's] case, I find that the preponderance of all the medical evidence, including the x-ray, CT scan, and medical opinion evidence, establishes that [claimant] has both simple pneumoconiosis as well as complicated pneumoconiosis, *based on the findings of large masses that have been designated as* [*C*]*ategory A or B opacities in six ILO readings.* Considering the totality of the medical evidence, I find that [claimant] has established that he has a disease process in his lungs that appears on x-ray as opacities greater than one centimeter in diameter, due to pneumoconiosis.

Id. at 14 (emphasis added). Thus, the administrative law judge found that claimant was entitled to the irrebuttable presumption of total disability due to pneumoconiosis pursuant to 20 C.F.R. §718.304.[5]

[5] The administrative law judge also found that because claimant "has established more than ten years of coal mine employment, he is entitled to the presumption, which has not been rebutted, that his pneumoconiosis arose from his coal mine employment." Decision and Order at 21 n.10.

Employer asserts on appeal that the administrative law judge found that claimant does not have simple pneumoconiosis. Employer's Brief at 5. Employer argues, therefore, that the administrative law judge erred in crediting the positive x-ray readings for complicated pneumoconiosis by Drs. Miller, Forehand, Alexander and Groten because they also identified simple pneumoconiosis on claimant's x-rays. *Id.*; *see* Decision and Order at 13. Employer, however, mischaracterizes the administrative law judge's finding. Pursuant to 20 C.F.R. §718.202(a)(1), the administrative law judge considered readings of the x-rays dated August 25, 2008, April 22, 2009, and July 14, 2009 for the existence of pneumoconiosis. Decision and Order at 12. She determined that the August 25, 2008 x-ray was positive for the existence of pneumoconiosis and that the remaining two x-rays did not establish the existence of pneumoconiosis because the readings were in equipoise. *Id*. The administrative law judge did not find that the evidence established the absence of pneumoconiosis. Moreover, contrary to employer's argument, claimant is not required to establish the existence of simple pneumoconiosis at 20 C.F.R. §718.202(a) in order to establish the existence of complicated pneumoconiosis at 20 C.F.R. §718.304.

Employer also argues that the administrative law judge erred in stating that the CT scan evidence supports a finding of complicated pneumoconiosis, in the absence of a specific determination by the administrative law judge that the masses identified on the CT scans would appear larger than one centimeter on an x-ray. Employer's Brief at 3-4. We disagree. The administrative law judge reasonably concluded that the CT scan readings, which identify large masses ranging in size from five to six centimeters, further corroborates the x-ray evidence identifying either Category A and B opacities or large masses that likewise measure five to six centimeters. *See Scarbro*, 220 F.3d at 256, 22 BLR at 2-101 (holding that x-ray evidence displaying opacities greater than one centimeter "can lose force only if other evidence affirmatively shows that the opacities are not there or are not what they seem to be"); *Double B Mining, Inc. v. Blankenship*, 177 F.3d 240, 243, 22 BLR 2-554, 2-560-61 (4th Cir. 1999). Moreover, because Dr. Fino specifically stated that a five centimeter mass on a CT scan would show as a Category B opacity on x-ray, we see no error in the administrative law judge's reference to the CT scan readings to support her overall conclusion that claimant established the existence of complicated pneumoconiosis. *Id.*; *see* Decision and Order at 10; Employer's Exhibit 12.

Employer does not specifically challenge the administrative law judge's finding that the opinions of Drs. Scott, Scatarige and Wheeler are speculative as to the etiology of claimant's lung masses and entitled to little weight. *See Cox*, 602 F.3d at 285, 24 BLR at 2-284. Thus, we affirm the administrative law judge's credibility findings with regard to those physicians' opinions.[6] *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711

[6] Employer argues that the administrative law judge erred in considering the medical opinion evidence at 20 C.F.R. §718.304(c), as employer contends that these

(1983). Moreover, we reject employer's contention that the administrative law judge erred in her consideration of Dr. Fino's opinion. The administrative law judge permissibly assigned little weight to Dr. Fino's opinion, that claimant does not have complicated pneumoconiosis, because his "review of the available medical evidence was woefully incomplete." Decision and Order at 16-17; *see Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 533, 21 BLR 2-323, 2-335 (4th Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 441, 21 BLR 2-269, 2-275-76 (4th Cir. 1997). Furthermore, the administrative law judge found that Dr. Fino could only speculate about "the etiology of a mass that he did not believe existed," and Dr. Fino "did not offer any explanation as to how [claimant's] lack of respiratory impairment precluded a finding of large opacities of pneumoconiosis on his x-rays." *Id*.

We also reject employer's argument that the administrative law judge was required to render findings at 20 C.F.R. §718.204(b)(2)(i)-(iv), on whether claimant established the presence of a totally disabling respiratory or pulmonary impairment, before determining whether claimant suffers from complicated pneumoconiosis. Contrary to employer's assertion, a totally disabling respiratory or pulmonary impairment is not a prerequisite for invocation of the irrebuttable presumption. *See* 20 C.F.R. §718.304(a)-(c). Moreover, the administrative law judge addressed Dr. Fino's discussion of the absence of a respiratory impairment in this case. Decision and Order at 9-10, 17. However, as discussed *supra*, the administrative law judge found that Dr. Fino did not sufficiently explain why the absence of a respiratory impairment in this case precluded "a finding of large opacities of pneumoconiosis on [claimant's] x-rays." *Id*. at 17.

---

opinions are no more than a restatement of the x-ray evidence. Employer's Brief at 4-5. Employer asserts that the evidence at 20 C.F.R. §718.304(c) can only invoke the irrebuttable presumption if "that evidence is the equivalent of the condition described in [20 C.F.R.] §718.304(a)." *Id*. Contrary to employer's argument, the administrative law judge did not render specific findings at each individual subsection of 20 C.F.R. §718.304. The administrative law judge properly weighed all the relevant evidence together when determining whether claimant suffers from complicated pneumoconiosis. *See Westmoreland Coal Co. v. Cox*, 602 F.3d 276, 24 BLR 2-269 (4th Cir. 2010); *Director, OWCP v. Eastern Coal Corp.* [*Scarbro*], 220 F.3d 250, 22 BLR 2-93 (4th Cir. 2000); *Lester v. Director, OWCP*, 993 F.2d 1143, 1145-46, 17 BLR 2-114, 2-117-18 (4th Cir. 1993). Nor has employer identified any evidence that the administrative law judge failed to consider when finding that claimant met his burden of proof at 20 C.F.R. §718.304.

The administrative law judge properly assessed the credibility of the evidence in light of *Cox* and explained why claimant met his burden of establishing the existence of complicated pneumoconiosis. *See Cox*, 602 F.3d at 285, 24 BLR at 2-284; *Scarbro*, 220 F.3d at 256, 22 BLR at 2-101 (explaining that "all of the evidence must be considered and evaluated to determine whether the evidence as a whole indicates a condition of such severity that it would produce opacities greater than one centimeter in diameter on an x-ray"). Because it is based upon substantial evidence, we affirm the administrative law judge's finding that claimant established the existence of complicated pneumoconiosis pursuant to 20 C.F.R. §718.304 and a change in an applicable condition of entitlement at 20 C.F.R. §725.309. *See Lester*, 993 F.2d at 1145-46, 17 BLR at 2-117-18; *Melnick*, 16 BLR at 1-33-34; *White*, 23 BLR at 1-3. We, therefore, affirm the award of benefits in this claim.

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

SO ORDERED.

_____
NANCY S. DOLDER, Chief
Administrative Appeals Judge

_____
REGINA C. McGRANERY
Administrative Appeals Judge

_____
BETTY JEAN HALL
Administrative Appeals Judge