BRB No. 99-0487 BLA

CHARLES E. FOX	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	DATE ISSUED:
IMPERIAL COLLIERY COMPANY	)	
	)	
Employer-Petitioner	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	DECISION and ORDER
Party-in-Interest	)	

Appeal of the Decision and Order of Linda S. Chapman, Administrative Law Judge, United States Department of Labor.

Brian C. Murchison (Legal Practice Clinic, Washington and Lee University School of Law), Lexington, Virginia, for claimant.

Mary Rich Maloy (Jackson & Kelly PLLC), Charleston, West Virginia, for employer.

Before: SMITH, BROWN, and McGRANERY, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order (98-BLA-0996) of Administrative Law Judge Linda S. Chapman awarding benefits on a 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). On July 17, 1997, claimant filed the present application for benefits, which is a duplicate claim because it was filed more than one year after the denial of his previous claim. Director's Exhibits 1, 30; *see* 20

C.F.R. §725.309(d).[1] The district director awarded benefits and employer requested a hearing, which was held on October 6, 1998. The administrative law judge issued her Decision and Order on January 6, 1999.

The administrative law judge credited claimant with "over 28 years of coal mine employment," Decision and Order at 4, and found that employer is the responsible operator. The administrative law judge found that the medical evidence developed since the previous denial established the existence of complicated pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.304(a), 718.203(b), which entitled claimant to the irrebuttable presumption that he is totally disabled due to pneumoconiosis, and demonstrated a material change in conditions as required by 20 C.F.R. §725.309(d). Accordingly, the administrative law judge awarded benefits.

On appeal, employer contends that the administrative law judge made several errors in her weighing of the medical evidence. Claimant responds, urging affirmance, and the Director, Office of Workers' Compensation Programs (the Director), has filed a limited response urging the Board to reject employer's argument that the administrative law judge erred in accepting the principle that pneumoconiosis is a progressive disease.[2]

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[1] Claimant's initial application for benefits filed on June 12, 1973 was finally denied by the Social Security Administration on June 20, 1979. Director's Exhibit 30. His second application filed on October 2, 1984 was finally denied by the Department of Labor on March 14, 1985, and his third application filed on March 5, 1987 was finally denied on February 12, 1992. *Id.*

[2] We affirm as unchallenged on appeal the administrative law judge's findings regarding length of coal mine employment, responsible operator status, onset date, and pursuant to 20 C.F.R. §718.203(b). *See Coen v. Director, OWCP*, 7 BLR 1-30 (1984); *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

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 law. 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).

To be entitled to benefits under 20 C.F.R. Part 718, claimant must demonstrate by a preponderance of the evidence that he is totally disabled due to pneumoconiosis arising out of coal mine employment. *See* 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure to establish any one of these elements precludes entitlement. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1989); *Trent v. Director, OWCP*, 11 BLR 1-26 (1987).

Where a 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 there has been a material change in conditions. 20 C.F.R. §725.309(d). The United States Court of Appeals for the Fourth Circuit, within whose jurisdiction this case arises, has held that pursuant to Section 725.309(d), the administrative law judge must determine whether the evidence developed since the prior denial establishes at least one of the elements previously adjudicated against claimant. *Lisa Lee Mines v. Director, OWCP [Rutter]*, 86 F.3d 1358, 20 BLR 2-227 (4th Cir. 1996), *rev'g en banc*, 57 F.3d 402, 19 BLR 2-223 (4th Cir. 1995). If a material change in conditions is established, the administrative law judge must then consider whether all of the evidence establishes entitlement to benefits. *Rutter, supra*.

Claimant's previous claim was denied because he failed to establish total disability pursuant to Section 718.204. Director's Exhibit 30. Therefore, the threshold issue before the administrative law judge was whether the new medical evidence established this element.

A miner is considered totally disabled if the irrebuttable presumption in Section 718.304 applies. 20 C.F.R. §718.204(b). Section 411(c)(3)(A) of the Act, 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 when diagnosed by chest x-ray, "yields one or more large opacities (greater than one centimeter in diameter) and would be classified in category A, B, or C in the International Classification of Radiographs of the Pneumoconioses by the International Labor Organization." 30 U.S.C. §921(c)(3)(A); 20 C.F.R. §718.304(a).

Of the thirty-four new x-ray readings classified for the presence or absence of

pneumoconiosis, sixteen readings bore notations indicating the presence of large opacities, categories A and B, and eighteen readings indicated that large opacities were absent.[3] In determining the weight to be accorded to these x-ray readings, the administrative law judge considered the readers' radiological qualifications, *see Adkins v. Director, OWCP*, 958 F.2d 49, 16 BLR 2-61 (4th Cir. 1992), and also took into account the conflicting medical opinions which addressed in detail the diagnostic significance of the opacities seen on claimant's x-rays. Claimant submitted narrative reports by highly qualified physicians who stated that the slow, steady progression in the size and profusion of claimant's x-ray opacities, the location of those large opacities in the apexes of claimant's lungs, claimant's coal dust exposure as a roof bolter, and the lack of any tuberculosis or cancer in claimant's medical history pointed to complicated pneumoconiosis as the diagnosis. In contrast, employer submitted the opinions of highly qualified physicians who stated that the location of the opacities in the lung apexes was diagnostic of conglomerate tuberculosis, not complicated pneumoconiosis. Additionally, some of employer's physicians reasoned that the progression in claimant's lung opacities years after his coal mine employment ended weighed against a diagnosis of complicated pneumoconiosis.

After thoroughly discussing all of the new x-rays, narrative reports, and deposition testimony in light of the physicians' qualifications, the administrative law judge found the opinions of claimant's experts to be better reasoned and explained and therefore more persuasive than those of employer's physicians. Decision and Order at 8-23. Accordingly, the administrative law judge found the existence of complicated pneumoconiosis established pursuant to Section 718.304(a).

Employer first contends that the administrative law judge selectively analyzed

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[3] The administrative law judge found that there were eleven classified readings that were positive for complicated pneumoconiosis and eighteen readings that were negative for complicated pneumoconiosis. The administrative law judge did not include in her chart of the x-ray readings five positive readings for complicated pneumoconiosis by B-reader Dr. Cohen, Decision and Order at 5-8, Claimant's Exhibit 23, although she did in fact consider Dr. Cohen's readings later in her decision. Decision and Order at 20-21.

Dr. Crisalli's opinion that claimant does not have complicated pneumoconiosis. Employer's Brief at 5-9. Contrary to employer's contention, however, the administrative law judge did not discount Dr. Crisalli's opinion merely because he did not take an x-ray or read an x-ray film. The administrative law judge offered several reasons for according less weight to Dr. Crisalli's opinion, Decision and Order at 13-14, one of which was that, despite examining claimant, Dr. Crisalli did not take a chest x-ray himself but instead relied heavily on the x-ray reports of other physicians--whose views the administrative law judge did not credit--to conclude that claimant's x-ray opacities are not diagnostic of complicated pneumoconiosis. This finding was within the administrative law judge's discretion to assess the quality of Dr. Crisalli's documentation and reasoning, *see Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 21 BLR 2-323 (4th Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 21 BLR 2-269 (4th Cir. 1997), and substantial evidence supports it. Additionally, contrary to employer's contention that the administrative law judge erroneously discounted a supplemental report by Dr. Crisalli as cursory and unexplained, substantial evidence supports the administrative law judge's finding that in his brief, handwritten letter, Dr. Crisalli offered no explanation of the way in which the evidence he reviewed supported his conclusion that claimant does not have complicated pneumoconiosis and possibly not even simple pneumoconiosis. Employer's Exhibit 12; *see Hicks, supra*; *Akers, supra*. Therefore, we reject employer's contention.

Employer argues that the administrative law judge mischaracterized Dr. Fino's opinion as a diagnosis of complicated pneumoconiosis. Employer's Brief at 9-10. This contention lacks merit. Review of the administrative law judge's decision indicates that she recognized that Dr. Fino's opinion was that claimant does not have complicated pneumoconiosis. Decision and Order at 17-18; Employer's Exhibits 4, 11. The administrative law judge, however, reasonably read Dr. Fino's comment that he "d[id] not see significant evidence of complicated pneumoconiosis," Employer's Exhibit 4 at 11, as a recognition by Dr. Fino that there was some radiological evidence in the record of complicated pneumoconiosis,[4] although Dr. Fino himself concluded that complicated pneumoconiosis was absent. Decision and Order at 22. Therefore, we reject employer's argument.

Employer asserts that the administrative law judge irrationally declined to credit the opinions of Drs. Fino and Dahhan because of their view that claimant's pulmonary function and blood gas studies do not show that he is totally disabled, and thus suggest that he does not have complicated pneumoconiosis. Employer's

[4] Dr. Fino reviewed the x-ray readings of physicians who indicated the presence of category B large opacities. Employer's Exhibit 4.

Brief at 10-11. Contrary to employer's assertion, it was within the administrative law judge's discretion to accord less weight to the opinions of physicians who relied on pulmonary function and blood gas study values to rule out complicated pneumoconiosis, since the diagnosis of complicated pneumoconiosis is made by x-ray, autopsy or biopsy, or their equivalents, *see* 20 C.F.R. §718.304(a)-(c), and does not require claimant to prove total disability. *See Trent*, 11 BLR at 1-28 (pulmonary function studies not relevant to a determination at 718.304(c)); *Adams v. Director, OWCP*, 886 F.2d 818, 820, 13 BLR 2-52, 2-54 (6th Cir. 1989)(claimant need not prove an element where he is aided by a presumption).

Employer next contends that the administrative law judge irrationally "reject[ed]" Dr. Wheeler's opinion that the opacities on claimant's x-rays are not complicated pneumoconiosis merely because Dr. Wheeler did not cite published medical studies to support his statements. Employer's Brief at 11. Contrary to this contention, the administrative law judge permissibly found that the opinions of claimant's physicians, particularly Drs. Cohen and Koenig, were more persuasive than Dr. Wheeler's opinion, *see Kuchwara v. Director, OWCP*, 7 BLR 1-167, 1-170 (1984), because they supported their opinions with citations to medical literature stating that the large opacities of complicated pneumoconiosis can appear in the lung apexes as on claimant's x-rays, and that simple pneumoconiosis can progress to complicated pneumoconiosis even after dust exposure ceases. Claimant's Exhibits 9, 11, 23; Decision and Order at 15, 18-23; *see Hicks, supra*; *Akers, supra*. The administrative law judge took into account that Dr. Wheeler disagreed with the medical literature on these points, but reasonably declined to credit his view because despite his "excellent credentials and . . . experience," Dr. Wheeler "offered no studies or other support for his statements." Decision and Order at 22; *see Hicks, supra*; *Akers, supra*. Therefore, we reject employer's contention.

Employer asserts that the administrative law judge erred by assuming that pneumoconiosis is a progressive disease as a basis for according less weight to the opinions of Drs. Wheeler and Stewart. Employer's Brief at 11-13. Contrary to employer's suggestion, the administrative law judge did not find the opinions of Drs. Wheeler and Stewart to be hostile to the Act. Rather, she permissibly found them to be unpersuasive because they cited no studies to support their view that pneumoconiosis does not progress absent further coal dust exposure, Decision and Order at 17-23; *see Hicks, supra*; *Akers, supra*, and rationally concluded that their opinions to that effect were "somewhat undercut," Decision and Order at 23 n.11, in view of the recognized principle that pneumoconiosis is a progressive disease.[5] *See*

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[5] Employer did not submit evidence into the record before the administrative law judge to support its contention that simple pneumoconiosis is not progressive. *See*

Rutter, 86 F.3d at 1364, 20 BLR at 2-239. Additionally, to the extent that employer argues that the administrative law judge failed to determine whether pneumoconiosis progressed in this particular case, Employer's Brief at 12, employer's contention lacks merit. The administrative law judge credited the x-ray readings and narrative opinions by physicians who opined that claimant's simple pneumoconiosis progressed and became complicated pneumoconiosis. Decision and Order at 12-23. Therefore, we reject employer's allegations of error.

Finally, employer contends that the administrative law judge irrationally credited the opinions of claimant's physicians Drs. Cohen, Koenig, and Alexander. Employer's Brief at 13-14. However, employer's assertion that the administrative law judge ignored the physicians' relative qualifications simply lacks merit; the administrative law judge discussed the physicians' credentials and took them into account when she compared the documentation, reasoning, explanation, and the underlying assumptions of the medical opinions. Decision and Order at 12-22; *see Hicks, supra*; *Akers, supra*. Additionally, the administrative law judge did not ignore the fact that Drs. Crissali, Fino, Stewart, and Dahhan reviewed and rejected the conclusions of claimant's physicians. The administrative law judge was well aware that employer's physicians disagreed with Drs. Anderson, Cohen, and Koenig, but, as discussed above, the administrative law judge was not persuaded by the reasons employer's physicians gave for concluding that complicated pneumoconiosis was absent from claimant's chest x-rays. Therefore, we reject employer's contention that the administrative law judge irrationally credited the opinions of Drs. Cohen, Koenig, and Alexander.

In sum, the administrative law judge properly weighed the conflicting medical evidence and substantial evidence supports her finding that claimant established the existence of complicated pneumoconiosis pursuant to Section 718.304(a). Therefore, we affirm the administrative law judge's findings pursuant to Sections 718.304(a) and 725.309(d). *See Rutter, supra*.

Peabody Coal Co. v. Spese, 117 F.3d 1001, 1010, 21 BLR 2-113, 2-129 (7th Cir. 1997)(*en banc rehearing*)(whether simple pneumoconiosis can progress absent further coal dust exposure is a question of legislative fact).

Accordingly, the administrative law judge's Decision and Order awarding benefits is affirmed.

SO ORDERED.

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ROY P. SMITH
Administrative Appeals Judge

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JAMES F. BROWN
Administrative Appeals Judge

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REGINA C. McGRANERY
Administrative Appeals Judge