BRB No. 11-0389 BLA

PAUL W. SMITH	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
R.A.T. CONTRACTORS	)	
	)	DATE ISSUED: 02/29/2012
Employer-Petitioner	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

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

Joseph E. Wolfe and Ryan C. Gilligan (Wolfe Williams Rutherford & Reynolds), Norton, Virginia, for claimant.

Sarah Y.M. Kirby (Two Rivers Law Group P.C.), Christiansburg, Virginia, for employer.[1]

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

PER CURIAM:

Employer appeals the Decision and Order on Modification Awarding Benefits (10-BLA-5075) of Administrative Law Judge Linda S. Chapman rendered on a miner's subsequent claim filed pursuant to the Black Lung Benefits Act, 30 U.S.C. §§901-944

[1] Employer's counsel states that she also represents employer's insurance carrier, Commerce & Industry Insurance Company, which was not listed in the caption of the administrative law judge's Decision and Order. Employer's Brief at 1.

(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's first claim for benefits, filed on November, 24, 2003, was denied by the district director on February 3, 2005, because claimant did not establish that he was totally disabled by a respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(b)(2). Director's Exhibit 1. Claimant filed his current claim on June 30, 2006. Director's Exhibit 27.

In a Decision and Order issued on July 8, 2008, Administrative Law Judge Richard T. Stansell-Gamm found that the medical evidence developed since the denial of the prior claim did not establish that claimant was totally disabled by a respiratory impairment pursuant to 20 C.F.R. §718.204(b)(2), or establish invocation of the irrebuttable presumption of total disability due to pneumoconiosis pursuant to 20 C.F.R. §718.304. Judge Stansell-Gamm therefore determined that claimant failed to establish a change in the applicable condition of entitlement, pursuant to 20 C.F.R. §725.309(d), and he denied benefits. Director's Exhibit 76.

Claimant timely requested modification pursuant to 20 C.F.R. §725.310 and submitted additional medical evidence. Director's Exhibit 83. The district director denied modification and claimant requested a hearing, which was held on June 16, 2010, by Administrative Law Judge Linda S. Chapman (the administrative law judge).

In a Decision and Order issued on January 18, 2011, which is the subject of this appeal, the administrative law judge credited claimant with at least twenty-five years of coal mine employment, pursuant to the parties' stipulation.[2] The administrative law judge found that the evidence submitted on modification, considered with the evidence originally submitted in the subsequent claim, established that claimant suffers from complicated pneumoconiosis and therefore, established invocation of the irrebuttable presumption of total disability due to pneumoconiosis pursuant to 20 C.F.R. §718.304. The administrative law judge determined that claimant established a change in the applicable condition of entitlement pursuant to 20 C.F.R. §725.309(d), and a mistake in a determination of fact in Judge Stansell-Gamm's decision denying benefits, pursuant to 20 C.F.R. §725.310. The administrative law judge further found that claimant was entitled to the presumption that his complicated pneumoconiosis arose out of his coal mine

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

employment pursuant to 20 C.F.R. §718.203(b), and that employer did not rebut the presumption. Accordingly, the administrative law judge awarded benefits.[3]

On appeal, employer asserts that the administrative law judge erred in her analysis of the x-ray, biopsy, and medical opinion evidence in finding that claimant invoked the irrebuttable presumption of total disability due to pneumoconiosis.[4] Claimant responds, urging affirmance of the award of benefits. The Director, Office of Workers' Compensation Programs, has not submitted a brief in this appeal.

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).

In order to establish entitlement to benefits in a living miner's claim pursuant to 20 C.F.R. Part 718, claimant must establish that he suffers from pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, and that the pneumoconiosis is totally disabling. *See* 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. 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). Claimant's first claim was denied because claimant did not establish that he was totally disabled. Director's Exhibit 1. Consequently, to obtain review of the merits of his current claim, claimant had to submit new evidence establishing that element of entitlement. 20 C.F.R. §725.309(d)(2),(3). Additionally, because claimant requested modification of Judge Stansell-Gamm's denial of his subsequent claim based on a failure to establish a change in the applicable condition of entitlement, the issue before the administrative law judge was whether the new evidence submitted on modification,

[3] Because the administrative law judge awarded benefits under 20 C.F.R. §718.304, she did not reach the issue of whether a recent amendment to the Act affected this case. *See* Pub. L. No. 111-148, §1556(a),(c); 30 U.S.C. §921(c)(4).

[4] 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). That finding is therefore affirmed. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

considered along with the evidence originally submitted in the subsequent claim, established a change in the applicable condition of entitlement. *See* 20 C.F.R. §725.309(d); *Hess v. Director, OWCP*, 21 BLR 1-141, 143 (1998).

One method of establishing total disability is by means of the irrebuttable presumption set forth at 20 C.F.R. §718.304. 20 C.F.R. §718.204(b)(1). 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. The United States Court of Appeals for the Fourth Circuit has held that, "[b]ecause prong (A) sets out an entirely objective scientific standard" for diagnosing complicated pneumoconiosis, that is, an x-ray opacity greater than one centimeter in diameter, the administrative law judge must determine whether a condition which is diagnosed by biopsy or autopsy under prong (B) or by other means under prong (C) would show as a greater-than-one-centimeter opacity if it were seen on a chest x-ray. *Eastern Associated Coal Corp. v. Director, OWCP* [*Scarbro*], 220 F.3d 250, 255, 22 BLR 2-93, 2-100 (4th Cir. 2000); *Double B Mining, Inc. v. Blankenship*, 177 F.3d 240, 243, 22 BLR 2-554, 2-561-62 (4th Cir. 1999). In determining whether claimant has established invocation of the irrebuttable presumption of total disability due to pneumoconiosis pursuant to 20 C.F.R. §718.304, the administrative law judge must weigh together all of the evidence relevant to the presence or absence of complicated pneumoconiosis. *Lester v. Director, OWCP*, 993 F.2d 1143, 1145-46, 17 BLR 2-114, 2-117 (4th Cir. 1993); *Gollie v. Elkay Mining Corp*., 22 BLR 1-306, 1-311 (2003); *Melnick v. Consolidation Coal Co*., 16 BLR 1-31, 1-33-34 (1991)(*en banc*).

Pursuant to 20 C.F.R. §718.304(a), the administrative law judge considered fourteen readings of five x-rays and considered the readers' radiological qualifications.[5]

[5] Dr. Alexander, a Board-certified radiologist and B reader, read a September 27, 2006 x-ray as positive for both simple pneumoconiosis and a Category A large opacity. Claimant's Exhibit 1. Dr. Scott, who possesses the same radiological qualifications, read the same x-ray as negative for pneumoconiosis. Employer's Exhibit 4. Dr. DePonte, a Board-certified radiologist and B reader, read the January 3, 2007 x-ray as positive for both simple pneumoconiosis and a Category A large opacity. Director's Exhibit 14. Drs. Scott and Wheeler, both Board-certified radiologists and B readers, read the same x-ray as negative for pneumoconiosis. Employer's Exhibit 3. Drs. DePonte and Alexander read the March 22, 2007 x-ray as positive for both simple pneumoconiosis and a Category A large opacity, Director's Exhibit 83; Claimant's Exhibit 4, while Drs. Scott,

The administrative law judge determined that the x-ray evidence established the presence of a Category A large opacity in claimant's right lung.[6] Relevant to the issue employer raises on appeal, the administrative law judge discounted Dr. Wheeler's negative x-ray readings. She found that Dr. Wheeler did not adequately explain why he concluded that the peripheral location of the large nodule excluded complicated pneumoconiosis as its cause, or why the low profusion of background nodules meant that the large nodule was not complicated pneumoconiosis. Further, the administrative law judge noted that Dr. Wheeler relied on the fact that claimant is young, without explaining why claimant's age meant that the large nodule seen on his x-ray was not complicated pneumoconiosis. Finally, the administrative law judge discounted Dr. Wheeler's opinion that the large nodule was due to granulomatous disease, possibly histoplasmosis or tuberculosis, because Dr. Wheeler did not adequately explain why findings of granulomatous disease eliminated pneumoconiosis as the cause of the large nodule.[7]

Employer contends that administrative law judge erred in discounting Dr. Wheeler's negative x-ray readings. Employer's Brief at 4-5. We disagree. The administrative law judge permissibly found that Dr. Wheeler did not adequately explain how he was able to determine that the location of the large mass, or the low profusion of background nodules, caused him to eliminate complicated pneumoconiosis. *See Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 528, 21 BLR 2-323, 2-326 (4th Cir. 1998). Moreover, employer does not challenge the administrative law judge's additional findings, that Dr. Wheeler did not explain his reliance on claimant's "youth" as a reason

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Wheeler, and Gayler, with the same dual radiological qualifications, read the March 22, 2007 x-ray as negative for pneumoconiosis. Director's Exhibits 15, 69, 86; Employer's Exhibits 1, 2. Finally, Dr. DePonte read the May 22, 2009 and April 30, 2010 x-rays as positive for both simple pneumoconiosis and a Category A large opacity, Claimant's Exhibits 2, 5, while Dr. Wheeler read both x-rays as negative for pneumoconiosis. Employer's Exhibits 3, 6; Decision and Order at 4, 12-16, and n.10.

[6] Based on Dr. DePonte's description contained in the report of her reading of the most recent x-ray, dated April 30, 2010, the administrative law judge found that the Category A large opacity measures "nearly 5 cm. in diameter . . . ." Decision and Order at 14.

[7] In making this finding, the administrative law judge specifically noted that Dr. DePonte diagnosed both granulomatous disease and complicated pneumoconiosis, identifying calcified granulomas in claimant's lower lung zones, and a large opacity of complicated pneumoconiosis in claimant's right mid-lung. Decision and Order at 14, 19; Claimant's Exhibit 5.

for concluding that the large opacity on claimant's x-ray was not complicated pneumoconiosis, or explain why claimant's x-ray could not reflect the presence of both granulomatous disease and complicated pneumoconiosis, as was diagnosed by Dr. DePonte. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983). As employer raises no other arguments, we affirm the administrative law judge's finding that the x-ray evidence established the existence of a Category A large opacity pursuant to 20 C.F.R. §718.304(a).

Pursuant to 20 C.F.R. §718.304(b), the administrative law judge considered two reports interpreting a fine-needle aspirate biopsy that was taken from the mass in claimant's right lung in 2002.[8] Decision and Order at 19. Dr. Van Buren reported that the tissue from the right lung nodule revealed macrophages containing brown-black pigment and crystalline material, but no malignant cells. Dr. Van Buren concluded that the tissue findings were "consistent with an anthracosilicotic nodule." Director's Exhibit 69. Dr. Oesterling reported that the tissue sample revealed anthracotic pigment and crystals of silica and silicates, but contained no collagen fibers of "nodular coal workers' pneumoconiosis." *Id*. Dr. Oesterling opined that the "extremely limited" sample was not sufficient to determine whether interstitial lung disease was present,[9] and concluded that the sample indicated "anthracotic pigmentation which may represent mild macular pneumoconiosis." *Id*.

The administrative law judge found that the interpretations of the biopsy provided "evidence on the etiology of th[e] mass," indicating that the right lung mass was anthracotic or anthracosilicotic in nature. Decision and Order at 19. In so finding, the administrative law judge determined that Dr. Oesterling's observation, that the "extremely limited" tissue sample contained no "nodular coal workers' pneumoconiosis," focused more on the extent of disease detected than on the etiology of the mass from which the sample was taken. The administrative law judge therefore determined that Dr. Oesterling's observation did not undercut Dr. Van Buren's opinion that the right lung nodule was consistent with an anthracosilicotic nodule.

[8] As summarized by the administrative law judge, claimant's treating physicians ordered a needle biopsy of the right lung nodule in order to rule out a neoplasm. Decision and Order at 17, 18. When the fine-needle aspirate was taken from the lung nodule on April 30, 2002, the nodule was described as measuring one to two centimeters in diameter. Decision and Order at 17; Director's Exhibit 69.

[9] Dr. Oesterling recommended that a wedge biopsy be performed. Director's Exhibit 69.

Employer argues that the administrative law judge overlooked Dr. Oesterling's statement that there was no indication of nodular coalworkers' pneumoconiosis in the biopsy sample. Employer's Brief at 9. This argument lacks merit. The administrative law judge considered this aspect of Dr. Oesterling's opinion, and found that Dr. Oesterling did not clearly address the etiology of the mass in claimant's lung, but instead focused on whether the extent of coal workers' pneumoconiosis could be determined by the limited tissue sample. We conclude that substantial evidence supports the administrative law judge's permissible determination that Dr. Oesterling focused more on whether the tissue sample reflected the extent of claimant's disease, than on the etiology of the mass from which the sample was taken. *See Hicks*, 138 F.3d at 528, 21 BLR at 2-326. Therefore, we reject employer's allegation of error in the administrative law judge's finding that the biopsy evidence under 20 C.F.R. §718.304(b) indicated that the right lung mass detected on x-ray was anthracotic and contained silica crystals.

Pursuant to 20 C.F.R. §718.304(c), the administrative law judge considered four medical opinions, along with readings of multiple CT scans, and claimant's medical treatment records. Dr. Agarwal diagnosed clinical pneumoconiosis with progressive massive fibrosis, noting a "size A" large opacity. Claimant's Exhibit 2. Dr. Rasmussen diagnosed claimant with complicated pneumoconiosis, Category A. Director's Exhibit 11. Dr. Castle opined that claimant "most likely does not have a simple or complicated pneumoconiosis," but has "evidence of significant old granulomatous disease, namely tuberculosis." Employer's Exhibit 5. Dr. Hippensteel opined that claimant's x-ray "picture" was "not suggestive of complicated pneumoconiosis," and stated that claimant's lack of physiological impairment, and his history of a positive skin test for tuberculosis, were "more suggestive" of inflammation from "granulomatous disease" than complicated pneumoconiosis.[10] Director's Exhibit 16.

The administrative law judge found that Dr. Castle's opinion, that claimant "most likely" did not have evidence of complicated pneumoconiosis, was "equivocal" and did not "provide useful information on the etiology of the acknowledged mass in claimant's

[10] Claimant argues in his response brief that, contrary to employer's position in this case, the record contains no evidence that he was diagnosed with tuberculosis. Claimant contends that the record reflects only that he had a positive PPD test in 1998, indicating exposure to tuberculosis and, as was described by Dr. Castle, he was then "treated with isoniazid prophylaxis for nine months." Employer's Exhibit 5 at 15. We need not resolve this issue, in view of the administrative law judge's finding that claimant's positive skin test and subsequent treatment were not dispositive of whether he established complicated pneumoconiosis, since claimant's x-ray and CT scan evidence indicated the presence of both granulomatous disease and complicated pneumoconiosis. Decision and Order at 14, 19-20.

right lung." Decision and Order at 14. Additionally, the administrative law judge found that Dr. Hippensteel did not adequately explain what about claimant's x-ray "picture" led him to conclude that the x-ray was not suggestive of complicated pneumoconiosis. She further found Dr. Hippensteel's opinion, that claimant's findings were "more suggestive" of granulomatous disease, to be equivocal, and not well-reasoned because it ignored the x-ray and CT scan evidence indicating that claimant has both granulomatous disease and complicated pneumoconiosis.[11]

Contrary to employer's assertion, we hold that the administrative law judge acted within her discretion in finding that the opinions of Drs. Castle and Hippensteel were equivocal regarding the cause of the large nodule in claimant's right lung. *See Piney Mountain Coal Co. v. Mays*, 176 F.3d 753, 756, 21 BLR 2-587, 2-591 (4th Cir. 1999); Employer's Brief at 5-7, 9-10. Further, substantial evidence supports the administrative law judge's finding that Dr. Hippensteel did not explain the basis for his conclusion that claimant's "chest x-ray picture . . . is not suggestive of complicated pneumoconiosis." Director's Exhibit 16. Therefore, she permissibly found that his opinion was not well-reasoned. *See Hicks*, 138 F.3d at 528, 21 BLR at 2-326; *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 441, 21 BLR 2-269, 2-275-76 (4th Cir. 1997). We therefore reject employer's allegations of error and affirm the administrative law judge's findings pursuant to 20 C.F.R. §718.304(c).

Weighing together all of the evidence under 20 C.F.R. §718.304(a)-(c), the administrative law judge found that the "overwhelming preponderance" of the evidence established that claimant has "a condition in his lungs that has resulted in the development of masses that appear on x-ray as larger than one centimeter in diameter, which are due to pneumoconiosis." Decision and Order at 10. Employer argues that the administrative law judge shifted the burden to employer to establish the absence of complicated pneumoconiosis. Employer's Brief at 4, 11. We reject employer's argument, as the instances cited by employer constitute permissible credibility determinations, rather than a shift in the burden of proof. *See Hicks*, 138 F.3d at 528, 21 BLR at 2-326; *Akers*, 131 F.3d at 441, 21 BLR at 2-275-76; *Melnick*, 16 BLR at 1-33-34. Therefore, we affirm the administrative law judge's finding that claimant established invocation of the irrebuttable presumption of total disability due to pneumoconiosis at 20 C.F.R. §718.304, *see Scarbro*, 220 F.3d at 255, 22 BLR at 2-100, and demonstrated a change in the applicable condition of entitlement under 20 C.F.R. §725.309(d).

[11] The administrative law judge further found that, although Drs. Agarwal and Rasmussen diagnosed complicated pneumoconiosis, their diagnoses were based on x-ray readings and did not add any information regarding the etiology of the mass in claimant's right lung. Decision and Order at 14.

Accordingly, the administrative law judge's Decision and Order on Modification Awarding 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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REGINA C. McGRANERY
Administrative Appeals Judge