BRB No. 12-0324 BLA

HERBERT O. THOMAS	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	DATE ISSUED: 02/26/2013
ISLAND CREEK COAL COMPANY	)	
	)	
Employer-Respondent	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order of Thomas M. Burke, Administrative Law Judge, United States Department of Labor.

S.F. Raymond Smith (David Huffman Law Services), Parkersburg, West Virginia, for claimant.

Tiffany B. Davis (Jackson Kelly PLLC), Morgantown, West Virginia, for employer.

Before: , and , Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order (10-BLA-5876) of Administrative Law Judge Thomas M. Burke denying benefits on a claim filed pursuant to the provisions of the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (Supp. 2011) (the Act).

This case involves a subsequent claim filed on August 25, 2009.[1] Director's Exhibit 6.

After crediting claimant with at least thirty-eight years of coal mine employment,[2] the administrative law judge found that the new evidence did not establish the existence of simple pneumoconiosis pursuant to 20 C.F.R. §718.202(a), or total disability pursuant to 20 C.F.R. §718.204(b)(2).[3] The administrative law judge further found that the new evidence did not establish the existence of complicated pneumoconiosis. Consequently, the administrative law judge found that claimant did not invoke the irrebuttable presumption of total disability due to pneumoconiosis provided at Section 411(c)(3) of

[1] Claimant filed four previous claims, all of which were finally denied. Director's Exhibits 1-4. Claimant's most recent claim, filed on July 31, 2003, was denied by the district director on June 4, 2004, because claimant failed to establish any element of entitlement. Decision and Order at 2; Director's Exhibit 4.

[2] The record indicates that claimant's coal mine employment was in West Virginia. Director's Exhibit 7. Accordingly, this case arises within the jurisdiction 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).

[3] Congress enacted amendments to the Act, which became effective on March 23, 2010, affecting claims filed after January 1, 2005. Relevant to this miner's claim, Section 1556 of Public Law No. 111-148 reinstated the presumption of Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4). Under Section 411(c)(4), if a miner establishes at least fifteen years of underground coal mine employment, or coal mine employment in conditions substantially similar to those in an underground mine, and that he or she has a totally disabling respiratory impairment, there will be a rebuttable presumption that the miner is totally disabled due to pneumoconiosis. 30 U.S.C. §921(c)(4). If the presumption is invoked, the burden of proof shifts to employer to disprove the existence of pneumoconiosis, or to establish that the miner's pulmonary or respiratory impairment "did not arise out of, or in connection with," coal mine employment. 30 U.S.C. §921(c)(4). Because claimant failed to establish that he is totally disabled pursuant to 20 C.F.R. §718.204(b)(2), the administrative law judge found that claimant did not invoke the Section 411(c)(4) presumption. Decision and Order at 13.

the Act, 30 U.S.C. §921(c)(3), as implemented by 20 C.F.R. §718.304. The administrative law judge, therefore, found that claimant failed to establish that an applicable condition of entitlement had changed since the date upon which the denial of his prior claim became final. *See* 20 C.F.R. §725.309. Accordingly, the administrative law judge denied benefits.

On appeal, claimant contends that the administrative law judge erred in finding that the new evidence did not establish the existence of complicated pneumoconiosis pursuant to 20 C.F.R. §718.304. Employer responds in support of the administrative law judge's denial of benefits. The Director, Office of Workers' Compensation Programs, has not filed a response brief.[4]

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).

[4] Because claimant does not challenge the administrative law judge's findings that the new evidence did not establish the existence of simple pneumoconiosis pursuant to 20 C.F.R. §718.202(a) or total disability pursuant to 20 C.F.R. §718.204(b)(2), these findings are affirmed. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983). In light of our affirmance of the administrative law judge's finding pursuant to 20 C.F.R. §718.204(b)(2), we also affirm the administrative law judge's finding that claimant did not invoke the Section 411(c)(4) presumption. 30 U.S.C. §921(c)(4).

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 prior claim was denied because he failed to establish that he had pneumoconiosis or was totally disabled by a respiratory or pulmonary impairment. Director's Exhibit 4. Consequently, to obtain review of the merits of his claim, claimant had to submit new evidence establishing either that he suffers from pneumoconiosis or that he is totally disabled. 20 C.F.R. §725.309(d).

Claimant contends that the administrative law judge erred in finding that the new x-ray and medical opinion evidence did not establish invocation of the irrebuttable presumption of total disability due to pneumoconiosis pursuant to 20 C.F.R. §718.304.[5]

[5] Under Section 411(c)(3) of the Act, 30 U.S.C. §921(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 the miner is suffering from a chronic dust disease of the lung which (A) when diagnosed by x-ray, yields one or more opacities greater than one centimeter in diameter that would be 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, would be a condition that could reasonably be expected to yield a result equivalent to (A) or (B). *See* 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. *Lester v. Director, OWCP*, 993 F.2d 1143, 1145-46, 17 BLR 2-214, 2-

Specifically, claimant argues that the administrative law judge "applied a manifestly improper legal standard" by failing to consider claimant's entitlement based upon the statutory criteria, and instead improperly focused on whether employer's physicians would diagnose the disease that they recognize in the medical profession as "complicated pneumoconiosis." Claimant's Brief 5-6 (unpaginated). We disagree.

Pursuant to 20 C.F.R. §718.304(a), the administrative law judge considered four interpretations of a February 8, 2010 x-ray. Dr. Rasmussen, a B reader, interpreted the x-ray as positive for both simple and complicated pneumoconiosis. Director's Exhibit 14. Drs. Wiot, Scott, and Wheeler, each dually qualified as a B reader and Board-certified radiologist, interpreted the same x-ray as negative for both simple and complicated pneumoconiosis.[6] Employer's Exhibits 1-3.

In evaluating the conflicting x-ray evidence pursuant to 20 C.F.R. §718.304(a), the administrative law judge properly noted that greater weight could be accorded to the x-ray interpretations rendered by physicians with the dual qualifications of B reader and Board-certified radiologist. *See Adkins v. Director, OWCP*, 958 F.2d 49, 16 BLR 2-61 (4th Cir. 1992); *Sheckler v. Clinchfield Coal Co.*, 7 BLR 1-128 (1984); Decision and Order at 9. The administrative law judge credited the negative interpretations of Drs. Wiot, Scott, and Wheeler of the February 8, 2010 x-ray, over Dr. Rasmussen's positive

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117-18 (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).

[6] Dr. Gaziano, a B reader, reviewed the February 8, 2010 x-ray for its film quality only. Director's Exhibit 14.

interpretation, based upon their superior radiological qualifications, and because he found that they explained the reasons for their negative readings. *Id.* at 10. The administrative law judge, therefore, found that the x-ray evidence did not establish the existence of complicated pneumoconiosis. *Id.*

We reject claimant's contention that the administrative law judge erred in his consideration of the x-ray evidence. The administrative law judge properly considered the number of x-ray interpretations, along with the readers' qualifications, the dates of the x-rays, and the actual readings.[7] *See Adkins*, 958 F.2d at 52, 16 BLR at 2-66; *White*, 23 BLR at 1-4-5; *Chaffin v. Peter Cave Coal Co.*, 22 BLR 1-294, 1-300 (2003). Because it is supported by substantial evidence, we affirm the administrative law judge's finding

[7] Claimant argues that the x-ray interpretations of Drs. Wiot, Scott, and Wheeler are speculative and, therefore, entitled to no weight. Claimant's argument lacks merit. The administrative law judge permissibly rejected claimant's contention, that the x-ray interpretations of Drs. Wiot, Scott, and Wheeler are speculative:

> Although Dr. Scott and Dr. Wheeler did use the words "possible" or "possibly" when describing the potential diseases seen on the radiographs, they conclusively and persuasively ruled out coal workers' pneumoconiosis. Specifically, Dr. Wheeler explained that "the nodules are granulomatous disease and not CWP because [the] pattern is asymmetrical and peripheral. CWP gives symmetrical small nodular infiltrates in central and mid upper lungs and involves periphery only when spilling over from extensive central lung disease." Dr. Scott was of a similar opinion as he explained that he ruled out coal workers' pneumoconiosis because he found "no symmetrical small opacities to suggest silicosis/CWP." Both of their findings were supported by Dr. Wiot, who also found no evidence of coal workers' pneumoconiosis. Accordingly, their findings are accepted as well-reasoned and well-explained.

Decision and Order at 10; *see Piney Mountain Coal Co. v. Mays*, 176 F.3d 753, 756, 21 BLR 2-587, 2-591 (4th Cir. 1999).

that the x-ray evidence did not establish the existence of complicated pneumoconiosis pursuant to 20 C.F.R. §718.304(a).

Claimant also contends that the administrative law judge erred in finding that Dr. Rasmussen's opinion did not establish the existence of complicated pneumoconiosis pursuant to 20 C.F.R. §718.304(c).[8] Claimant's contention is without merit. The administrative law judge considered the new medical opinions of Drs. Rasmussen and Hippensteel. While Dr. Rasmussen diagnosed complicated pneumoconiosis, Director's Exhibit 14, Dr. Hippensteel opined that claimant did not suffer from the disease. Employer's Exhibit 4.

The administrative law judge permissibly found that the x-ray that Dr. Rasmussen relied upon to diagnose claimant with complicated pneumoconiosis was interpreted as negative for the disease by better qualified physicians, thus calling into question the reliability of Dr. Rasmussen's medical opinion. *See Island Creek Coal Co. v. Compton*, 211 F.3d 203, 22 BLR 2-162 (4th Cir. 2000); *Lester v. Director, OWCP*, 993 F.2d 1143, 1145-46, 17 BLR 2-214, 2-117-18 (4th Cir. 1993); Decision and Order at 11-12. Therefore, we affirm the administrative law judge's finding that the new medical opinion evidence did not establish the existence of complicated pneumoconiosis pursuant to 20 C.F.R. §718.304(c).[9]

[8] The record contains no biopsy evidence relevant to the existence of complicated pneumoconiosis pursuant to 20 C.F.R. §718.304(b).

[9] The administrative law judge also found that the CT scan evidence did not establish the existence of complicated pneumoconiosis pursuant to 20 C.F.R.

Claimant does not identify, nor does the record reflect, any point at which the administrative law judge failed to consider whether claimant satisfied the statutory criteria for invoking the irrebuttable presumption. The administrative law judge considered all of the relevant evidence, and substantial evidence supports his determination that claimant did not establish invocation of the irrebuttable presumption set forth at 20 C.F.R. §718.304. That determination is, therefore, affirmed.

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

SO ORDERED.

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Administrative Appeals Judge

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Administrative Appeals Judge

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Administrative Appeals Judge

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§718.304(c). Decision and Order at 10-11; Employer's Exhibit 4. Because this finding is unchallenged on appeal, it is affirmed. *Skrack*, 6 BLR at 1-711.