BRB No. 05-0529 BLA

HERSCHEL H. JENKS, SR.	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
AMIGO SMOKELESS COAL COMPANY	)	
	)	
and	)	
	)	
PITTSTON COMPANY	)	DATE ISSUED: 01/31/2006
	)	
Employer/Carrier-Petitioner	)	
	)	
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 Jeffrey Tureck, Administrative Law Judge, United States Department of Labor.

Frederick K. Muth (Hensley, Muth, Garton & Hayes), Bluefield, West Virginia, for claimant.

Douglas A. Smoot and Kathy L. Snyder (Jackson Kelly PLLC), Morgantown, West Virginia, for employer/carrier.

Sarah M. Hurley (Howard Radzely, Solicitor of Labor; 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:

Employer appeals the Decision and Order Awarding Benefits (04-BLA-5636) of Administrative Law Judge Jeffrey Tureck 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). The administrative law judge credited claimant with thirty-six years of coal mine employment[1] and adjudicated this subsequent claim pursuant to the regulations contained in 20 C.F.R. Part 718.[2]

Claimant's prior claim for benefits was denied because he did not establish that he was totally disabled by a respiratory or pulmonary impairment. Director's Exhibit 1. In claimant's current, subsequent claim, the administrative law judge found that the medical evidence developed since the final denial of claimant's prior claim established the existence of complicated pneumoconiosis, entitling claimant to the irrebuttable presumption of total disability due to pneumoconiosis at Section 411(c)(3) of the Act, 30 U.S.C. §921(c)(3), as implemented by 20 C.F.R. §718.304. Consequently, the administrative law judge concluded that a change in an applicable condition of entitlement was established as required by 20 C.F.R. §725.309(d). Accordingly, benefits were awarded.

On appeal, employer asserts that the administrative law judge abused his discretion in excluding evidence submitted by employer that the administrative law judge found in excess of the evidentiary limitations set forth at 20 C.F.R. §725.414. Employer further asserts that the administrative law judge erred by failing to weigh together the old and new evidence to determine whether a change in an applicable condition of entitlement was established pursuant to 20 C.F.R. §725.309(d). Additionally, employer argues that the administrative law judge erred in his analysis of the relevant medical evidence under Section 718.304 when he found that claimant suffers from complicated pneumoconiosis. Claimant responds, urging affirmance of the administrative law judge's

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[1] The record indicates that claimant's coal mine employment occurred in West Virginia. Director's Exhibits 1, 4. 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*).

[2] Claimant filed a previous application for benefits on November 14, 1978. Director's Exhibit 1. That claim was denied on February 24, 1983, by Administrative Law Judge Aaron Silverman because claimant failed to establish that he was totally disabled by a respiratory or pulmonary impairment. *Id*. The Board affirmed the decision denying benefits on March 10, 1986. *Jenks v. Amigo Smokeless Coal Co.*, BRB No. 83-0678 BLA (Mar. 10, 1986)(unpub.). Claimant did not pursue the claim any further, and the denial became final. Claimant filed his current claim on July 25, 2002. Director's Exhibit 3.

award of benefits. The Director, Office of Workers' Compensation Programs (the Director), responds, urging affirmance of the administrative law judge's evidentiary rulings under Section 725.414. The Director also argues that the administrative law judge was not required to weigh together the old and new evidence to determine whether a change in an applicable condition of entitlement was established. Additionally, without taking a position on the merits of claimant's entitlement to benefits, the Director urges rejection of two of employer's allegations of error under Section 718.304. Employer has filed a reply brief reiterating its contentions.[3]

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).

Employer challenges the validity of Section 725.414(a)(3) and contends that the administrative law judge's adherence to the numerical limitations of the regulations led to the improper exclusion of several relevant exhibits. Employer's Brief at 19-21; Hearing Transcript at 9-12; Employer's Exhibits 2, 4A, 5. Employer relies on the Act's provision that all relevant evidence shall be considered, 30 U.S.C. §923(b), and the decision of the United States Court of Appeals for the Fourth Circuit in *Underwood v. Elkay Mining, Inc.*, 105 F.3d 946, 21 BLR 2-23 (4th Cir. 1997). The Board has considered and rejected these arguments. *Dempsey v. Sewell Coal Co.*, 23 BLR 1-47, 1-58-59 (2004)(*en banc*). We therefore reject employer's contention that Section 725.414 is invalid and we affirm the administrative law judge's exclusion of the proffered exhibits.

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. 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*).

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

[3] We affirm as unchallenged on appeal the administrative law judge's findings with respect to length of coal mine employment and the existence of simple coal worker's pneumoconiosis. *See Coen v. Director, OWCP*, 7 BLR 1-30, 1-33 (1984); *Skrack v. Director, OWCP*, 6 BLR 1-710 (1983); Decision and Order at 2, 4.

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 was totally disabled by a respiratory or pulmonary impairment. Director's Exhibit 1. Consequently, claimant had to submit new evidence establishing that he is totally disabled. 20 C.F.R. §725.309(d)(2),(3); *see also Lisa Lee Mines v. Director, OWCP [Rutter]*, 86 F.3d 1358, 20 BLR 2-227 (4th Cir. 1996)(*en banc*)(holding under former provision that claimant must establish at least one element of entitlement previously adjudicated against him).

The administrative law judge found that claimant established a change in an applicable condition of entitlement by proving, with new evidence, that he now suffers from complicated pneumoconiosis and thus is irrebuttably presumed totally disabled due to pneumoconiosis. Employer contends that the administrative law judge erred because he did not analyze whether the new evidence differed qualitatively from that submitted in claimant's prior claim. Employer's Brief at 17. The Director responds that the administrative law judge was not required to qualitatively compare the old and new evidence under Section 725.309(d). Director's Brief at 4.

We agree with the Director that the administrative law judge law judge was not required to qualitatively compare the old and new evidence. Under revised Section 725.309(d), a claimant establishes a change in an applicable condition of entitlement "only if new evidence submitted in connection with the subsequent claim establishes at least one applicable condition of entitlement." 20 C.F.R. §725.309(d)(3). The regulation nowhere mentions a qualitative comparison of the old and new evidence. Employer's reliance on *Furgerson v. Jericol Mining, Inc.*, 22 BLR 1-216 (2002)(*en banc*) is misplaced. In *Furgerson*, which arose in the Sixth Circuit under the former Section 725.309(d), the Board held that an administrative law judge erred in finding that a material change in conditions was established because he did not apply the Sixth Circuit court's standard set forth in *Sharondale Corp. v. Ross*, 42 F.3d 993, 19 BLR 2-10 (6th Cir. 1994), requiring a qualitative comparison of the old and new evidence. *Furgerson*, 22 BLR at 1-224. By contrast, this claim is governed by revised Section 725.309(d), and moreover, this claim arises in the Fourth Circuit, which did not require a comparison of the old and new evidence to determine a material change in conditions under the former Section 725.309(d). *Rutter*, 86 F.3d at 1363 n.11, 20 BLR at 2-237 n.11 (declining to endorse the Sixth Circuit's requirement to consider whether the new evidence differs qualitatively from the old evidence). Consequently, we reject employer's allegation of error.

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, (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 which would yield results equivalent to (A) or (B). 30 U.S.C. §921(c)(3)(A); 20 C.F.R. §718.304(a). The Fourth Circuit court 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 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 2-114, 2-117-18 (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*).

Pursuant to Section 718.304(a), the administrative law judge noted that there were seven properly classified readings of three chest x-rays. The administrative law judge found that Dr. Forehand's interpretation of the September 18, 2002 x-ray and Dr. Pathak's and Dr. Cappiello's interpretations of the May 28, 2003 x-ray were positive for category A or B opacities, whereas Drs. Wheeler and Scatarige each found evidence of large masses, but classified the x-rays as negative for both simple and complicated pneumoconiosis. Decision and Order at 4; Director's Exhibits 12-13; Employer's Exhibit 4. The administrative law judge indicated that "[n]ormally," he would give greater weight to the readings of Drs. Wheeler and Scatarige based on their "superior qualifications," but concluded that "in this case the x-ray evidence cannot be evaluated in a vacuum; it must be evaluated after consideration of the biopsy evidence." Decision and Order at 4.

Pursuant to Section 718.304(b), the administrative law judge considered pathology reports by Drs. Pullins, Naeye, and Stefanini concerning a March 4, 1998, needle biopsy taken from one of the large lesions in claimant's left lung. Decision and Order at 4; Director's Exhibit 11; Employer's Exhibit 1. Since Drs. Naeye and Stefanini diagnosed coal workers' pneumoconiosis, and Dr. Pullins diagnosed anthracosis and fibrosis, the administrative law judge found that the biopsy established at least simple pneumoconiosis. Additionally, based on Dr. Naeye's and Dr. Stefanini's comments about the very small size of the tissue sample, and Dr. Stefanini's recommendation of a

repeat biopsy to determine the severity of the disease, the administrative law judge found that the biopsy tissue sample "was too small to conclusively determine the presence of complicated pneumoconiosis." Decision and Order at 5.

After reviewing the biopsy evidence, the administrative law judge returned to the chest x-rays pursuant to Section 718.304(a). Viewing the chest x-ray readings in light of the biopsy results that confirmed the existence of simple pneumoconiosis, the administrative law judge found that "x-ray interpretations post-dating the biopsy which do not diagnose at least simple pneumoconiosis are not probative." Decision and Order at 5. Accordingly, the administrative law judge discredited the negative readings by Drs. Wheeler and Scatarige. The administrative law judge concluded that "[t]he remaining x-ray interpretations are all positive for complicated pneumoconiosis in that they report lesions much greater than one centimeter in diameter. Therefore, the x-ray evidence is positive for complicated pneumoconiosis." Decision and Order at 5.

The administrative law judge then considered computerized tomography (CT) scan readings and medical opinions pursuant to Section 718.203(c). Regarding the December 13, 2001 CT scan, the administrative law judge found that Dr. Ward's interpretation was too conjectural to be considered a positive reading, and that the negative interpretations for both simple pneumoconiosis and complicated pneumoconiosis by Drs. Wheeler, Scatarige, and Scott were not credible because the physicians failed to detect simple pneumoconiosis.[4] Decision and Order at 5-6; Employer's Exhibits 7, 13. By contrast, the administrative law judge found that Dr. Capiello's diagnosis of category B complicated pneumoconiosis, based on his reading of the December 13, 2001 CT scan, in conjunction with his reading of the September 18, 2002 and June 2, 2003 x-rays, and his review of Dr. Stefanini's biopsy report, was entitled to "great weight." Decision and Order at 5-6; Claimant's Exhibit 1. Additionally, the administrative law judge discounted Dr. Crisalli's opinion that claimant has only simple pneumoconiosis and that the large masses on his x-rays are evidence of past infectious disease, because the administrative law judge found the x-rays to be "the most probative evidence in this record for diagnosing complicated pneumoconiosis," and the physicians who had actually read the x-rays diagnosed complicated pneumoconiosis. Decision and Order at 7. The administrative law judge discounted Dr. Castle's opinion that claimant has only simple pneumoconiosis because his report "add[ed] nothing to the

[4] Employer references a CT scan conducted on March 4, 1998 and read by Dr. Fowler. Review of the record did not disclose this CT scan reading. The exhibit that employer cites contains Dr. Fowler's reading of a March 4, 1998 "post needle biopsy radiograph," that Dr. Fowler was comparing to the CT scan that he had used to guide him in taking the needle biopsy. Employer's Exhibit 3 at 2.

record" beyond stating that, because Dr. Naeye diagnosed only simple pneumoconiosis, he also diagnosed simple pneumoconiosis. *Id*.

Based on the foregoing analysis, the administrative law judge found that claimant established invocation of the irrebuttable presumption that he is totally disabled due to pneumoconiosis pursuant to Section 718.304(a).

Pursuant to Section 718.304(a), employer asserts that the administrative law judge erred in discrediting the negative x-ray readings because he erroneously assumed that if evidence of simple pneumoconiosis showed in a biopsy it would also appear on x-rays. Employer's Brief at 13. Contrary to employer's assertion, the failure of Drs. Wheeler and Scatarige to diagnose at least simple pneumoconiosis on the 2002 and 2003 x-rays, when the 1998 biopsy evidence established that simple pneumoconiosis was present, was a valid consideration in the administrative law judge's weighing of the conflicting x-ray evidence. *See* 30 U.S.C. §923(b); *see generally 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). Moreover, the administrative law judge did not assume that the simple pneumoconiosis seen on biopsy would have appeared on x-ray; he had before him x-ray readings by Drs. Forehand, Cappiello, and Pathak diagnosing both simple and complicated pneumoconiosis. We therefore affirm the administrative law judge's finding pursuant to Section 718.304(a).

Pursuant to Section 718.304(b), employer asserts that the administrative law judge erred in his consideration of Dr. Naeye's opinion, arguing that the administrative law judge shifted the burden of proof by requiring "employer to 'rule out' coal dust exposure as the cause" of claimant's large opacities. Employer's Brief at 11. We disagree. Contrary to employer's argument, what the administrative law judge actually stated was that "[a]lthough [Dr. Naeye] found that the tissue sample is 'strongly against the diagnosis of complicated pneumoconiosis' . . . he did not completely rule out that diagnosis." Decision and Order at 5; Employer's Exhibit 1. As noted previously, the administrative law judge then found the biopsy evidence "too small to conclusively determine the presence of complicated pneumoconiosis." Decision and Order at 5. The administrative law judge's conclusion that the biopsy evidence did not establish the existence of complicated pneumoconiosis upon consideration of all of the relevant biopsy evidence demonstrates that claimant, not employer, had the burden of establishing the existence of complicated pneumoconiosis. *Director, OWCP v. Greenwich Collieries* [*Ondecko*], 512 U.S. 267, 18 BLR 2A-1 (1994).

Pursuant to Section 718.304(c), employer asserts that the administrative law judge erred in discounting the negative CT scan readings because Drs. Wheeler, Scott, and Scatarige did not detect at least the simple pneumoconiosis that was present on biopsy. Employer's Brief at 13. We reject this contention for the reason that we gave previously

concerning the administrative law judge's discounting of the negative x-rays.[5] Employer also contends that the administrative law judge erred in failing to consider the opinions of Drs. Crisalli and Castle that claimant has no pulmonary impairment. Employer's Brief at 14-15. The Director responds that evidence regarding the absence of respiratory impairment may be relevant to whether an x-ray diagnosis of complicated pneumoconiosis is appropriate, but notes that a miner need not prove that he has a respiratory impairment in order to establish entitlement to the irrebuttable presumption. Director's Brief at 4.

In this case, the administrative law judge found the opinions of Drs. Crisalli and Castle flawed because of problems with their documentation and reasoning. Decision and Order at 6-7; *see Hicks*, 138 F.3d at 533, 21 BLR at 2-335; *Akers*, 131 F.3d at 441, 21 BLR at 2-275-76. Thus, he never reached the credibility of their views that the miner had no evidence of pulmonary impairment. While opinions that claimant did not have a respiratory impairment are relevant, employer has identified no error in the administrative law judge's weighing of the opinions of Drs. Crisalli and Castle in this case. For the same reason, we reject employer's allegation that the administrative law judge did not adequately consider the physicians' respective qualifications in this case. Employer's Brief at 16. He considered the physicians' credentials, but discounted the opinions of Drs. Crisalli and Castle as flawed in their documentation and reasoning.

Employer asserts that the administrative law judge erred by failing to make an equivalency determination between the x-rays and CT scans before invoking the irrebuttable presumption under Section 718.304. Employer's Brief at 5-9. The Director responds that because the administrative law judge invoked the irrebuttable presumption based on the x-ray evidence, not the CT scan evidence, there was no need for an equivalency determination. Director's Brief at 3-4. As the Director notes, the administrative law judge found that the x-ray evidence was "the most probative evidence in this record for diagnosing complicated pneumoconiosis," and indicated, after weighing all of the evidence presented, that he invoked the irrebuttable presumption "under §718.304(a)," the x-ray evidence provision. Decision and Order at 7. In this context, employer does not explain why the administrative law judge had to perform an equivalency determination between the CT scans and the x-rays.

[5] Because the administrative law judge explained why he discounted the CT scan readings of Drs. Wheeler, Scott, and Scatarige, and credited Dr. Capiello's reading, we find no merit in employer's argument that the administrative law judge did not explain his finding as required by the Administrative Procedure Act, 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 30 U.S.C. §932(a), by means of 33 U.S.C. §919(d) and 5 U.S.C. §554(c)(2). Employer's Brief at 8-9.

Moreover, to the extent the administrative law judge relied on Dr. Capiello's positive CT scan reading of complicated pneumoconiosis, employer does not explain how that evidence conflicts with the administrative law judge's finding that the x-ray evidence established complicated pneumoconiosis. The equivalency determination is intended to ensure that "regardless of which diagnostic technique is used, the same underlying condition triggers the irrebuttable presumption." *Scarbro*, 220 F.3d at 255, 22 BLR at 2-100. Here, the lesions seen on claimant's CT scan were described as ranging from two to seven-and-a-half centimeters in diameter. Director's Exhibit 13; Claimant's Exhibit 1; Employer's Exhibit 7. Employer does not explain how the administrative law judge would find that those lesions on CT scan would not show as opacities greater than one centimeter on a chest x-ray. We therefore reject employer's allegation of error.

Therefore, we affirm the administrative law judge's finding that claimant established entitlement to the irrebuttable presumption that he is totally disabled due to pneumoconiosis pursuant to Section 718.304(a), and the administrative law judge's attendant finding that claimant established a change in an applicable condition of entitlement pursuant to Section 725.309(d).

Accordingly, the administrative law judge's Decision and Order 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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BETTY JEAN HALL
Administrative Appeals Judge