BRB No. 07-0400 BLA

R.V.	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
McCOY ELKHORN COAL CORPORATION	)	DATE ISSUED: 01/29/2008
	)	
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 Daniel F. Solomon, Administrative Law Judge, United States Department of Labor.

Thomas W. Moak (Moak & Nunnery, P.S.C.), Prestonsburg, Kentucky, for claimant.

James M. Kennedy (Baird & Baird, P.S.C.), Pikeville, Kentucky, for employer.

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

PER CURIAM:

Claimant appeals the Decision and Order (04-BLA-6456) of Administrative Law Judge Daniel F. Solomon denying 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). This case involves a subsequent claim filed on April 8, 2002.[1]

[1] Claimant initially filed a claim for benefits on April 18, 1985. Director's Exhibit 1. In a Decision and Order dated December 8, 1987, Administrative Law Judge Leonard M. Wagman denied benefits because the evidence did not establish the existence of

After crediting claimant with thirteen years of coal mine employment,[2] the administrative law judge found that the new evidence did not establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(4). Consequently, 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. §§718.202(a)(3), 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.

The Board must affirm the findings of the administrative law judge if they are supported by substantial evidence, are rational, and are 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).

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 was totally disabled. Director's Exhibit 2. Consequently, claimant had to submit new evidence establishing that he is totally disabled pursuant to 20 C.F.R.

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pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(2000), or total disability pursuant to 20 C.F.R. §718.204(c)(2000). *Id.* There is no indication that claimant took any further action in regard to his 1985 claim. Claimant filed a second claim on July 2, 1991. Director's Exhibit 2. On December 11, 1991, the district director denied benefits because the evidence did not establish that claimant was totally disabled. *Id.* There is no indication that claimant took any further action in regard to his 1991 claim. Claimant filed a third claim on April 8, 2002. Director's Exhibit 4.

[2] The record indicates that claimant's coal mine employment occurred in Kentucky. Director's Exhibit 1. Accordingly, this case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989)(*en banc*).

§718.204(b) in order to obtain review of the merits of his 2002 claim.[3] 20 C.F.R. §725.309(d)(2),(3).

Claimant argues that the administrative law judge erred in finding that claimant did not establish the existence of complicated pneumoconiosis, and therefore was not entitled to invocation of the irrebuttable presumption of total disability due to pneumoconiosis set out at 20 C.F.R. §718.304.[4] Because there is no new x-ray or biopsy evidence diagnosing complicated pneumoconiosis, we affirm the administrative law judge's findings that the new x-ray and biopsy evidence did not establish the existence of complicated pneumoconiosis pursuant to 20 C.F.R. §718.304(a) and (b). Decision and Order at 10.

Claimant, however, contends that the administrative law judge erred in finding that the new CT scan evidence did not establish invocation pursuant to 20 C.F.R. §718.304(c).[5] The new CT scan evidence includes four interpretations of two CT scans taken on November 25, 2003 and August 11, 2004. Claimant's Exhibits 4, 5; Employer's Exhibits 4, 6. Although Dr. Kendall, a Board-certified radiologist, noted findings consistent with complicated pneumoconiosis on claimant's November 25, 2003 CT scan, Claimant's Exhibit 4, Dr. Wiot, a B reader and Board-certified radiologist, opined that this CT scan revealed no evidence of coal workers' pneumoconiosis. Employer's Exhibit 4. The administrative law judge acted within his discretion in crediting Dr. Wiot's negative interpretation of the CT scan over Dr. Kendall's positive interpretation, based

[3] In this case, the administrative law judge focused upon whether the new medical evidence established the existence of pneumoconiosis, rather than upon whether the new evidence established the existence of total disability. Decision and Order at 9-11. On appeal, no party challenges this aspect of the administrative law judge's decision. Because the Board must limit its review to contentions of error that are specifically raised by the parties, *see* 20 C.F.R. §§802.211, 802.301, we do not address this issue further.

[4] Section 718.304 provides that there is an irrebuttable presumption that a miner is totally disabled due to pneumoconiosis if (a) an x-ray of the miner's lungs shows an opacity greater than one centimeter in diameter; (b) a biopsy or autopsy shows massive lesions in the lung; or (c) when diagnosed by other means, the condition could reasonably be expected to reveal a result equivalent to (a) or (b). *See* 20 C.F.R. §718.304.

[5] CT scan evidence falls into the "other means" category of establishing complicated pneumoconiosis at 20 C.F.R. §718.304(c). *See Melnick v. Consolidation Coal Co.*, 16 BLR 1-31 (1991) (*en banc*).

upon Dr. Wiot's superior qualifications.[6] 20 C.F.R. §718.202(a)(1); *see Sheckler v. Clinchfield Coal Co.*, 7 BLR 1-128 (1984); Decision and Order at 10.

Although Dr. Poulos, a B reader and Board-certified radiologist, interpreted claimant's August 11, 2004 CT scan as revealing "findings compatible with complicated pneumoconiosis,"[7] Dr. Wiot, a B reader and Board-certified radiologist, interpreted this CT scan as negative for complicated pneumoconiosis. Employer's Exhibit 5. Although the administrative law judge noted that Drs. Poulos and Wiot were each dually qualified as B readers and Board-certified radiologists, the administrative law judge acted within his discretion in according greater weight to Dr. Wiot's negative interpretation based upon his additional status as a former C reader.[8] *See Chaffin v. Peter Cave Coal Co*., 22 BLR 1-294, 1-302 (2003); *Worhach v. Director, OWCP*, 17 BLR 1-105, 1-108 (1993); *Melnick v. Consolidation Coal Co.*, 16 BLR 1-31 (1991)(*en banc*); Decision and Order at 10. We, therefore, affirm the administrative law judge's finding that the new CT scan evidence did not establish the existence of complicated pneumoconiosis pursuant to 20 C.F.R. §718.304(c).

Claimant also argues that the administrative law judge erred in finding that Dr. Rosenberg's opinion did not establish the existence of complicated pneumoconiosis pursuant to 20 C.F.R. §718.304(c). In a report dated August 31, 2004, Dr. Rosenberg noted that claimant's August 11, 2004 CT scan revealed definite areas of progressive massive fibrosis.[9] Claimant's Exhibit 5. Based upon the CT scan findings, Dr.

[6] Dr. Kendall did not opine that the CT scan findings would produce an opacity of greater than one centimeter if viewed by x-ray or would produce a massive lesion if viewed by biopsy. Claimant's Exhibit 4. Consequently, Dr. Kendall's opinion does not support a finding of complicated pneumoconiosis. *See Gray v. SLC Coal Co.*, 176 F.3d 382, 21 BLR 2-615 (6th Cir. 1999).

[7] Dr. Poulos noted that claimant's August 11, 2004 CT scan revealed the "presence of areas of progressive massive fibrosis." Claimant's Exhibit 5.

[8] Dr. Wiot explained that the C readers were essentially the "Task Force on Pneumoconiosis." Employer's Exhibit 7 at 8. As part of its mandate, the task force developed the examination for B reader certification. *Id.* Moreover, Dr. Poulos did not opine that the CT scan findings would produce an opacity of greater than one centimeter if viewed by x-ray or would produce a massive lesion if viewed by biopsy. Consequently, Dr. Poulos's opinion does not support a finding of complicated pneumoconiosis. *See Gray*, 176 F.3d at 390, 21 BLR at 2-630.

[9] Dr. Rosenberg apparently relied upon Dr. Poulos's interpretation of claimant's August 11, 2004 CT scan. *See* Claimant's Exhibits 5, 6.

Rosenberg opined that claimant suffered from complicated pneumoconiosis or progressive massive fibrosis. *Id.* The administrative law judge accorded less weight to Dr. Rosenberg's opinion because it was "based upon a questionable CT scan interpretation." Decision and Order at 11. The administrative law judge permissibly found that the August 11, 2004 CT scan that Dr. Rosenberg relied upon as positive for complicated pneumoconiosis was interpreted by Dr. Wiot, the best qualified physician of record, as negative for complicated pneumoconiosis, thus calling into question the reliability of Dr. Rosenberg's opinion.[10] *See generally Arnoni v. Director, OWCP*, 6 BLR 1-423 (1983); *White v. Director, OWCP*, 6 BLR 1-368 (1983). Consequently, 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) is affirmed.

Because it is supported by substantial evidence, we affirm the administrative law judge's finding that the new evidence did not establish the existence of complicated pneumoconiosis pursuant to 20 C.F.R. §718.304. *See Truitt v. North American Coal Corp.*, 2 BLR 1-199 (1979), *aff'd sub nom. Director, OWCP v. North American Coal Corp.*, 626 F.2d 1137, 2 BLR 2-45 (3d Cir. 1980). As claimant raises no other challenge to the administrative law judge's decision, we affirm the denial of benefits.

[10] Contrary to claimant's contention, the administrative law judge was not required to accord greater weight to Dr. Rosenberg's opinion because his report had been requested by employer. Although the United States Court of Appeal for the Sixth Circuit has recognized that an administrative law judge may, in some circumstances, consider party affiliation, *see Woodward v. Director, OWCP*, 991 F.2d 314, 321, 17 BLR 2-77, 2-87 (6th Cir. 1993), the Sixth Circuit has not held that party affiliation should be dispositive in determining the weight to be assigned the medical evidence. Consequently, the administrative law judge did not err in not considering party affiliation in this case.

Accordingly, the administrative law judge's Decision and Order denying 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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JUDITH S. BOGGS
Administrative Appeals Judge