BRB No. 10-0315 BLA

FREDDIE C. HAMILTON	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
SOUTH AKERS MINING COMPANY	)	
	)	DATE ISSUED: 01/27/2011
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 Remand Awarding Benefits of Daniel F. Solomon, Administrative Law Judge, United States Department of Labor.

James W. Herald III (Jones, Walters, Turner & Shelton PLLC), Pikeville, Kentucky, for employer.

Helen H. Cox (M. Patricia Smith, Solicitor of Labor; Rae Ellen James, Associate Solicitor; 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: SMITH, McGRANERY, and HALL, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order on Remand Awarding Benefits (2007-BLA-5821) of Administrative Law Judge Daniel F. Solomon rendered on a subsequent claim filed pursuant to the provisions of the Black Lung Benefits Act, 30 U.S.C. §§901-944 (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). This case is before the Board for the second time.

In his first Decision and Order, the administrative law judge noted that the claim before him involves a subsequent claim filed on July 25, 2006.[1] The administrative law judge credited claimant with at least nineteen years of coal mine employment,[2] as stipulated by employer, and correctly noted that, at the hearing, employer withdrew as contested issues, the existence of pneumoconiosis and that the pneumoconiosis arose out of coal mine employment. 20 C.F.R. §§718.202(a), 718.203(b); Hearing Transcript at 20. The administrative law judge found that the new evidence established total disability pursuant to 20 C.F.R. §718.204(b)(2), thereby establishing that one of the applicable conditions of entitlement had changed since the date upon which the denial of claimant's prior claim became final. 20 C.F.R. §725.309. The administrative law judge also found that the evidence established that claimant's total disability is due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c). Accordingly, the administrative law judge awarded benefits.

Employer appealed the award of benefits to the Board. Pursuant to employer's appeal, the Board vacated the administrative law judge's findings that the new evidence established total disability due to pneumoconiosis, pursuant to 20 C.F.R. §718.204(b)(2)(ii), (iv), (c), and remanded the case to the administrative law judge for further consideration.[3] *F.C.H.* [*Hamilton*] *v. South Akers Mining Co.*, BRB No. 08-0698 BLA (July 28, 2009)(unpub.). The Board further noted that the record contains evidence

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[1] Claimant initially filed a claim for benefits on August 18, 2004. Director's Exhibit 1. In a Proposed Decision and Order dated April 8, 2005, the district director found that the evidence established that claimant suffered from pneumoconiosis that was caused, at least in part, by his coal mine employment. Director's Exhibit 1. However, the district director found that the evidence did not establish the existence of a totally disabling pulmonary impairment. *Id.* The district director, therefore, denied benefits. There is no indication that claimant took any further action in regard to his 2004 claim.

[2] The record reflects that claimant's coal mine employment was in Kentucky. Director's Exhibit 8. 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 (1989)(*en banc*).

[3] The Board affirmed, as unchallenged on appeal, the administrative law judge's finding that the new pulmonary function study evidence did not establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(i). *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983); *Hamilton v. South Akers Mining Co.*, BRB No. 08-0698 BLA (July 28, 2009)(unpub.), slip op. at 3 n.3. Moreover, because the record contains no evidence of cor pulmonale with right-sided congestive heart failure, the Board held that claimant is precluded from establishing total disability pursuant to 20 C.F.R. §718.204(b)(2)(iii). *Hamilton*, slip op. at 3 n.3.

of complicated pneumoconiosis that was not addressed by the administrative law judge. *See* Director's Exhibit 14; Claimant's Exhibit 1. Consequently, the Board also instructed the administrative law judge, on remand, to address whether the evidence establishes the existence of complicated pneumoconiosis, thereby entitling claimant to the irrebuttable presumption of total disability due to pneumoconiosis at 20 C.F.R. §718.304. 20 C.F.R. §718.204(b)(1); *Hamilton*, slip op. at 7 n.11.

On remand, the administrative law judge reconsidered the relevant evidence and found that the x-ray evidence established the existence of complicated pneumoconiosis and, therefore, established invocation of the irrebuttable presumption of total disability due to pneumoconiosis at 20 C.F.R. §718.304(a). 30 U.S.C. §921(c)(3). The administrative law judge further found that the presumption, set forth in 20 C.F.R. §718.203(b), that claimant's pneumoconiosis arose out of coal mine employment, was invoked, and was not rebutted by employer. Based upon these findings, the administrative law judge determined that claimant established a change in an applicable condition of entitlement pursuant to Section 725.309(d), and entitlement to benefits on the merits. Accordingly, the administrative law judge awarded benefits.

On appeal, employer contends that the administrative law judge erred in finding that claimant established the existence of complicated pneumoconiosis, and entitlement to benefits, pursuant to 20 C.F.R. §718.304(a). Employer also argues that the administrative law judge erred in finding that claimant's complicated pneumoconiosis arose out of coal mine employment, pursuant to 20 C.F.R. §718.203(b). Neither claimant nor the Director, Office of Workers' Compensation Programs (the Director), has filed a response brief relevant to the merits of entitlement. However, the Director filed a limited brief addressing the potential impact on this case of Section 1556 of Public Law No. 111-148, which amended the Act with respect to the entitlement criteria for certain claims.

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).

Regarding the impact of Section 1556, the Director asserts that, while Section 1556 is applicable to this claim because it was filed after January 1, 2005, and claimant was credited with at least nineteen years of coal mine employment, the case need not be remanded to the administrative law judge for further consideration, unless the Board vacates the administrative law judge's award of benefits.[4]

[4] Relevant to this living miner's claim, Section 1556 reinstated the presumption of Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4), for claims filed after January 1, 2005,

As will be discussed below, we affirm the administrative law judge's award of benefits. Because claimant carried his burden to establish each element of entitlement by a preponderance of the evidence, we need not remand this case for the administrative law judge to consider this case in light of the recent amendments to the Act.

To be entitled to benefits under the Act, claimant must demonstrate by a preponderance of the evidence that he is totally disabled due to pneumoconiosis arising out of coal mine employment. 30 U.S.C. §901; 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). 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 the existence of a totally disabling respiratory impairment. Director's Exhibit 1. Consequently, claimant had to submit new evidence establishing this element of entitlement to obtain review of the merits of his claim. 20 C.F.R. §725.309(d)(2), (3).

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). Under Section 411(c)(3) of the Act, 30 U.S.C. §923(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 (A) an x-ray of the miner's lungs shows an opacity greater than one centimeter that would be classified as Category A, B, or C; (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. The introduction of legally sufficient evidence of complicated pneumoconiosis does not automatically qualify a claimant for the irrebuttable presumption found at 20 C.F.R. §718.304. The administrative law judge must examine all the evidence on this issue, *i.e.*, evidence of simple and complicated pneumoconiosis, as well as evidence of no pneumoconiosis, resolve the conflicts, and make a finding of fact. *See Gray v. SLC Coal Co.*, 176 F.3d 382, 21 BLR 2-615 (6th Cir. 1999); *Melnick v. Consolidation Coal Co.*, 16 BLR 1-31 (1991) (*en banc*); *Truitt v. North Am. Coal Corp.*,

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that are pending on or after March 23, 2010. Under Section 411(c)(4), if a miner establishes at least fifteen years of qualifying coal mine employment, 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), *amended by* Pub. L. No. 111-148, §1556, 124 Stat. 119 (2010) (to be codified at 30 U.S.C. §921(c)(4)).

2 BLR 1-199 (1979), *aff'd sub nom. Director, OWCP v. North Am. Coal Corp.*, 626 F.2d 1137, 2 BLR 2-45 (3d Cir. 1980).

Employer asserts that the administrative law judge erred in his evaluation of the x-ray evidence in finding complicated pneumoconiosis established pursuant to 20 C.F.R. §718.304(a). Specifically, employer asserts that the administrative law judge failed to consider all of the relevant x-ray evidence of record, and erred in crediting the positive reading by Dr. Alexander over the negative reading by Dr. Wheeler. Employer's Brief at 12-15. Employer's contentions lack merit.

Pursuant to Section 718.304(a), the administrative law judge considered six readings of three x-rays. Decision and Order on Remand at 3-4. An October 19, 2006 x-ray was read as positive for both simple pneumoconiosis, at a profusion of "3/3," and Category A large opacities by Dr. Rasmussen, a B reader, who interpreted the x-ray on behalf of the Department of Labor. Director's Exhibit 14. Dr. Alexander, a Board-certified radiologist and B reader, also interpreted the October 19, 2006 x-ray as positive for both simple pneumoconiosis, "3/3," and Category A large opacities. Claimant's Exhibit 1. Dr. Wheeler, also a Board-certified radiologist and B reader, indicated that the same x-ray was negative for both simple pneumoconiosis, "0/1," and for large opacities of complicated pneumoconiosis. Employer's Exhibit 2. Dr. Jarboe, a B reader, read a January 25, 2007 x-ray as positive for simple pneumoconiosis, "3/3," but negative for any large opacities, and Dr. Halbert, a B reader,[5] also read this x-ray as positive for simple pneumoconiosis, "3/3," but negative for any large opacities. Employer's Exhibit 4; Director's Exhibit 18. Finally, Dr. Dahhan, a B reader, read a January 27, 2007 x-ray as positive for simple pneumoconiosis, "3/2," but negative for any large opacities. Employer's Exhibit 1.

We initially note that, while the administrative law judge stated that the record contained readings of the October 19, 2006 DOL x-ray and "another x-ray," when, in fact, the record contains readings of three x-rays, the administrative law judge's Decision and Order reflects that he properly considered all of the x-ray readings of record, as set forth above. Decision and Order on Remand at 3. Thus, there is no merit to employer's contention that the administrative law judge failed to consider relevant x-ray evidence. Employer's Brief at 12-13.

Considering the quality and the quantity of the x-ray readings, the administrative law judge permissibly accorded the greatest probative value to the readings by Drs.

[5] The administrative law judge correctly noted that while Dr. Halbert's x-ray reading indicates that he is a B reader, his curriculum vitae is not contained in the record. Decision and Order on Remand at 3; Director's Exhibit 18.

Alexander and Wheeler of the October 19, 2006 x-ray, as the only readings of record rendered by dually-qualified physicians. *See Staton v. Norfolk & Western Ry. Co.*, 65 F.3d 55, 59, 19 BLR 2-271, 2-279-80 (6th Cir. 1995); *Woodward v. Director, OWCP*, 991 F.2d 314, 321, 17 BLR 2-77, 2-87 (6th Cir. 1993); Decision and Order on Remand at 3; Claimant's Exhibit 1; Employer's Exhibit 2. Further, contrary to employer's assertions, the administrative law judge reasonably considered that the October 19, 2006 x-ray was determined by Dr. Barrett to be "quality 1." *See Staton*, 65 F.3d at 59, 19 BLR at 2-279-80; *Woodward*, 991 F.2d at 320, 17 BLR at 2-87; *Edmiston v. F & R Coal Co.*, 14 BLR 1-65 (1990); Director's Exhibit 16.

Weighing together the positive and negative readings by Drs. Alexander and Wheeler, the administrative law judge rationally accorded greater weight to the positive reading by Dr. Alexander, because he is the sole dually-qualified reader to diagnose at least simple pneumoconiosis, consistent with the administrative law judge's own findings, the remaining x-ray evidence of record, and the parties' stipulation to the existence of the disease. *See Bobick v. Saginaw Mining Co.*, 13 BLR 1-52, 1-54 (1988); *Trujillo v. Kaiser Steel Corp.*, 8 BLR 1-472, 1-473 (1986); *see also Skukan v. Consolidation Coal Co.*, 99 F.2d 1228, 1233, 17 BLR 2-97, 2-104 (6th Cir. 1993), *vacated on other grounds*, 512 U.S. 1231 (1994); *Tussey v. Island Creek Coal Co.*, 982 F.2d 1036, 1042, 17 BLR 2-16, 2-24 (6th Cir. 1993); *Adams v. Director, OWCP*, 886 F.2d 818, 820, 13 BLR 2-52, 2-63 (6th Cir. 1989); Decision and Order at 16. Specifically, the administrative law judge found Dr. Alexander's "3/3," Category A x-ray reading to be supported by Dr. Rasmussen's reading of the same x-ray, also as "3/3," Category A, and further supported, in part, by the positive readings for simple pneumoconiosis, at profusion levels of "3/2" or "3/3," by all of the other readers of record, all of whom are B readers. Decision and Order on Remand at 3. By contrast, the administrative law judge found that Dr. Wheeler's "0/1," or negative reading was "in a minority of one as to the array of pneumoconiosis in this record." Decision and Order on Remand at 3. Thus, since the administrative law judge properly conducted a qualitative review of the x-ray evidence by considering the radiological expertise of the readers and reasonably determined which readings were more credible, he permissibly accorded greater probative weight to the reading of complicated pneumoconiosis by Dr. Alexander. *See Mullins Coal Co. of Va. v. Director, OWCP*, 484 U.S. 135, 11 BLR 2-1 (1987), *reh'g denied*, 484 U.S. 1047 (1988); *Allen v. Union Carbide Corp.*, 8 BLR 1-393, 1-395 (1985). Therefore, we affirm the administrative law judge's determination that the preponderance of the credible, new x-ray evidence established the existence of complicated pneumoconiosis under Section 718.304(a). *See Bobick*, 13 BLR at 1-54; *Trujillo*, 8 BLR at 1-473; *see also Skukan*, 99 F.2d at 1233, 17 BLR at 2-104, *vacated on other grounds*, 512 U.S. 1231 (1994).

As employer raises no other arguments relevant to the administrative law judge's fining of complicated pneumoconiosis, we affirm the administrative law judge's finding

that the relevant evidence, considered as a whole, established invocation of the irrebuttable presumption of total disability due to pneumoconiosis pursuant to Section 718.304. *See Gray*, 176 F.3d at 389-90, 21 BLR at 2-628-29; *Melnick*, 16 BLR at 1-33.

Employer next challenges the administrative law judge's finding that claimant's complicated pneumoconiosis arose out of his coal mine employment, pursuant to 20 C.F.R. §718.203. Employer contends that the administrative law judge erred in extending employer's stipulation, that claimant's simple pneumoconiosis arose out of coal mine employment, to find that claimant's complicated pneumoconiosis also arose out of his coal mine employment. Employer's argument lacks merit.

In considering the cause of claimant's complicated pneumoconiosis, the administrative law judge correctly found that employer stipulated to at least nineteen years of coal mine employment, entitling claimant to the rebuttable presumption that his complicated pneumoconiosis arose out of his coal mine employment, pursuant to Section 718.203(b). While the administrative law judge also noted that employer had stipulated to causation of simple pneumoconiosis, the record does not reflect that the administrative law judge relied on this prior stipulation with respect to the cause of claimant's complicated pneumoconiosis. Employer's Brief at 15. Rather, the administrative law judge specifically stated: "After a review of all of the evidence, I find that Employer has not rebutted this presumption . . . ." Decision and Order on Remand at 4. There is also no merit to employer's contention that the opinion of Dr. Wheeler, that not every type of pneumoconiosis arises from coal dust inhalation, constitutes substantial evidence to rebut the presumption. Employer's Brief at 15. Dr. Wheeler did not diagnose the presence of either simple or complicated pneumoconiosis, contrary to the administrative law judge's findings. Thus, contrary to employer's argument, Dr. Wheeler's opinion is not relevant to the cause of claimant's complicated pneumoconiosis. *See Skukan*, 99 F.2d at 1233, 17 BLR at 2-104; *Tussey*, 982 F.2d at 1042, 17 BLR at 2-24; *Adams*, 886 F.2d at 820, 13 BLR at 2-63. We therefore affirm, as supported by substantial evidence, the administrative law judge's finding that the presumption at Section 718.203(b) was not rebutted.

Accordingly, the administrative law judge's Decision and Order on Remand Awarding Benefits is affirmed.

SO ORDERED.

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ROY P. SMITH
Administrative Appeals Judge

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REGINA C. McGRANERY
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge