BRB No. 12-0214 BLA

DAVID D. BOYD	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
NICKS COAL COMPANY	)	
	)	
and	)	
	)	
ASHLAND COAL, INCORPORATED	)	DATE ISSUED: 01/24/2013
	)	
Employer/Carrier-Petitioners	)	
	)	
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 Award of Benefits of Daniel F. Solomon, Administrative Law Judge, United States Department of Labor.

Joseph E. Wolfe (Wolfe, Williams, Rutherford & Reynolds), Norton, Virginia, for claimant.

Paul E. Jones and James W. Herald, III (Jones, Walters, Turner & Shelton PLLC), Pikeville, Kentucky, for employer/carrier.

Rita Roppolo (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: DOLDER, Chief Administrative Appeals Judge, SMITH and HALL, Administrative Appeals Judges.

PER CURIAM:

Employer/carrier (employer) appeals the Decision and Order on Remand Award of Benefits (2007-BLA-05503) of Administrative Law Judge Daniel F. Solomon rendered on a subsequent miner's claim[1] filed on March 8, 2006, pursuant to the provisions of the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (Supp. 2011)(the Act). This case has been before the Board previously. In his first Decision and Order on the subsequent claim, the administrative law judge accepted the parties' stipulation to seventeen years of coal mine employment and found that the evidence of record established complicated pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.202, 718.203, 718.304. The administrative law judge, therefore, found that claimant was entitled to the irrebuttable presumption of totally disabling pneumoconiosis pursuant to Section 411(c)(3) of the Act, 30 U.S.C. §921(c)(3). Employer appealed, contending that the administrative law judge erred in finding complicated pneumoconiosis established at Section 718.304. Agreeing with employer, the Board held that the administrative law judge's decision was based on a faulty and limited evaluation of the new x-ray evidence. The Board, therefore, vacated the administrative law judge's decision awarding benefits and remanded the case for further consideration pursuant to 20 C.F.R. §§725.309; 718.304. On remand, the administrative law judge again found that claimant established complicated pneumoconiosis pursuant to Section 718.304 based on the evidence of record, and that claimant was, therefore, entitled to the irrebuttable presumption of totally disabling pneumoconiosis. *See* 30 U.S.C. §921(c)(3).

On appeal, employer contends that the administrative law judge again erred in his consideration of the evidence on the issue of complicated pneumoconiosis. Claimant and the Director, Office of Workers' Compensation Programs, respond, arguing that the administrative law judge properly found that the evidence established complicated pneumoconiosis.

The Board's scope of review is defined by statute. If the administrative law judge's findings of fact and conclusions of law are supported by substantial evidence, are

[1] Claimant filed his first claim for benefits on October 2, 1996. Director's Exhibit 1. That claim was denied by Administrative Law Judge Robert L. Hillyard because claimant, despite establishing simple pneumoconiosis, failed to establish total disability. The Board affirmed the denial in *Boyd v. Nicks Coal Co.*, BRB No. 99-0804 BLA (May 17, 2000)(unpub.). Claimant requested modification on June 5, 2000. The denial of the request for modification was affirmed by the Board in *Boyd v. Nicks Coal Co.*, BRB No. 04-0525 BLA (Jan. 14, 2005)(unpub.). Claimant subsequently filed the instant claim.

rational, and are consistent with the applicable law,[2] they are binding upon this Board and may not be disturbed. 33 U.S.C. §921(b)(3), as incorporated into the Act by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman and Grylls Associates, Inc.*, 380 U.S. 359 (1965).

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. Failure to establish any one of these elements precludes entitlement. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-112 (1989).

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 previous claim was denied because he failed to establish total disability. *See* Director's Exhibit 2. Consequently, in order to show a change in an applicable condition of entitlement, claimant had to submit new evidence of total disability. If the administrative law judge determined that the new evidence established such a change, he must then determine whether entitlement to benefits is established by considering and weighing all the evidence of record, relevant to each element of entitlement. 20 C.F.R. §725.309(d); *see Sharondale Corp. v. Ross*, 42 F.3d 993, 19 BLR 2-10 (6th Cir. 1994).

Complicated Pneumoconiosis

Section 411(c)(3) of the Act, 30 U.S.C. §921(c)(3), implemented by 20 C.F.R. §718.304 of the regulations, provides that there is an irrebuttable presumption of totally disabling 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); 20 C.F.R. §718.304; *Eastern Assoc. Coal Corp. v. Director, OWCP* [*Scarbro*], 220 F.3d 250, 255, 22 BLR 2-93, 2-100 (4th Cir. 2000). The introduction of

[2] The record indicates that claimant was last employed in the coal mining industry in Kentucky. *See* Hearing Transcript at 8. Accordingly, the Board will apply the law of the United States Court of Appeals for the Sixth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(en banc).

legally sufficient evidence of complicated pneumoconiosis does not automatically qualify a claimant for the irrebuttable presumption, however. Rather, the administrative law judge must examine all the evidence on the issue, *i.e.*, evidence of simple and complicated pneumoconiosis, as well as evidence that pneumoconiosis is not present, resolve any conflict, and make a finding of fact. *Lester v. Director, OWCP*, 993 F.2d 1143, 1145-46, 17 BLR 2-114, 2-117-18 (4th Cir. 1993); *Gray v. SLC Coal Co.*, 176 F.3d 382, 388, 21 BLR 2-615, 2-626 (6th Cir. 1999); *Gollie v. Elkay Mining Corp.*, 22 BLR 1-306, 1-311 (2003); *Melnick v. Consolidation Coal Co.*, 16 BLR 1-31, 1-33 (1991)(en banc).

The new evidence relevant to complicated pneumoconiosis consists of four x-rays.[3] The April 25, 2006 x-ray was read by Dr. Baker, a B reader, as positive for simple pneumoconiosis. Director's Exhibit 14. The x-ray was, however, interpreted by Dr. Wheeler, a B reader and Board-certified radiologist, as negative for pneumoconiosis. Employer's Exhibit 3. Dr. DePonte, a B reader and Board-certified radiologist, interpreted the x-ray as positive for simple pneumoconiosis. Claimant's Exhibit 3. The June 13, 2006 x-ray was read as showing simple, but not complicated, pneumoconiosis by Dr. Broudy, a B reader, and as showing both simple and complicated pneumoconiosis by Dr. DePonte. Director's Exhibit 18; Claimant's Exhibit 2. Dr. Wheeler interpreted the October 9, 2006 x-ray as showing no pneumoconiosis. Employer's Exhibit 3. The January 4, 2007 x-ray was read as positive for both simple and complicated pneumoconiosis by Dr. DePonte as well as by Dr. Alexander, a B reader and Board-certified radiologist. Dr. Wheeler, however, read this x-ray as negative for pneumoconiosis. Claimant's Exhibits 1, 7; Employer's Exhibit 7.

In finding that the new x-ray evidence established complicated pneumoconiosis, the administrative law judge properly rejected Dr. Wheeler's negative readings because he found that they "were aberrant in that only [Dr. Wheeler] … found no pneumoconiosis: not only no complicated pneumoconiosis but also no simple pneumoconiosis," Decision and Order at 5, when all of the other physicians found at least simple pneumoconiosis.[4] *See Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(en banc). Then, weighing all of the new x-rays showing either simple or complicated pneumoconiosis together, the administrative law judge properly found that complicated

[3] The administrative law judge found that there was no biopsy or other evidence "that would undermine the x-ray evidence." *See* 20 C.F.R. §718.304(b), (c). This finding is affirmed as unchallenged on appeal. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1984).

[4] The administrative law judge noted that simple pneumoconiosis was established in the prior claim. Decision and Order at 5, n.3.

pneumoconiosis was established. Specifically, the administrative law judge found that the June 2006 and January 2007 x-rays, which were read as showing complicated pneumoconiosis by Drs. DePonte and Alexander, dually-qualified physicians, outweighed the April 2006 x-ray showing simple pneumoconiosis only, because they were more recent. *See Adkins v. Director, OWCP*, 958 F.2d 49, 16 BLR 2-61 (4th Cir. 1992). Additionally, the administrative law judge properly credited the readings of complicated pneumoconiosis by Drs. DePonte and Alexander, as these doctors were better qualified than the readers who found only simple pneumoconiosis.[5] *See Adkins*, 958 F.2d at 52, 16 BLR at 2-66. Further, on weighing all of the evidence of record, the administrative law judge properly credited the more recent x-ray evidence showing complicated pneumoconiosis over the earlier x-ray evidence showing simple pneumoconiosis, as pneumoconiosis is a progressive disease. *See Clark*, 12 BLR at 1-154; *Casella v. Kaiser Steel Corp.*, 9 BLR 1-131 (1986).

Thus, we affirm the administrative law judge's finding that claimant established the existence of complicated pneumoconiosis pursuant to Section 718.304 and was, therefore, entitled to the irrebuttable presumption of totally disabling pneumoconiosis.[6] 30 U.S.C. §921(c)(3).

[5] By finding that the new x-ray evidence established complicated pneumoconiosis, that the evidence as a whole established complicated pneumoconiosis, and that claimant was entitled to the Section 411(c)(3) irrebuttable presumption of totally disabling pneumoconiosis, claimant established a change in an applicable condition of entitlement. *See* 20 C.F.R. §725.309.

[6] 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) is affirmed, as unchallenged on appeal. *See Skrack*, 6 BLR at 1-711.

Accordingly, the administrative law judge's Decision and Order on Remand Award of 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