BRB No. 08-0695 BLA

A.W.	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
ARMCO INCORPORATED/AK STEEL CORPORATION	)	DATE ISSUED: 07/20/2009
	)	
Employer-Respondent	)	
	)	
and	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order Denying Benefits of Richard A. Morgan, Administrative Law Judge, United States Department of Labor.

A.W., Montcoal, West Virginia, *pro se*.

Ashley M. Harman (Jackson Kelly PLLC), Morgantown, West Virginia, for employer.

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

PER CURIAM:

Claimant, without the assistance of counsel, appeals the Decision and Order Denying Benefits (2006-BLA-6115) of Administrative Law Judge Richard A. Morgan (the administrative law judge) rendered on a subsequent 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).[1] Considering the new evidence, the administrative law judge found that claimant failed to establish total disability, the element of entitlement previously adjudicated against him, and therefore, failed to establish a change in an applicable condition of entitlement at 20 C.F.R. §725.309. Specifically, the administrative law judge found that the new evidence failed to establish entitlement to the irrebuttable presumption of totally disabling pneumoconiosis pursuant to 20 C.F.R. §718.304, and that it failed to establish total disability pursuant to 20 C.F.R. §718.204(b). Accordingly, benefits were denied.

On appeal, claimant contends that he is entitled to benefits.[2] Employer responds, urging affirmance of the denial of benefits. The Director, Office of Workers' Compensation Programs, declines to participate in this appeal.

In an appeal filed by a claimant without the assistance of counsel, the Board considers the issue raised to be whether the Decision and Order below is supported by substantial evidence. *McFall v. Jewell Ridge Coal Corp.*, 12 BLR 1-176, 1-177 (1989). We must affirm the administrative law judge's Decision and Order if the findings of fact and conclusions of law are rational, supported by substantial evidence, and in accordance with law.[3] 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).

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[1] Claimant's first claim was filed on January 26, 1981. Although the existence of simple pneumoconiosis was found, the claim was denied on March 23, 1990 for failure to establish total disability. Claimant's second claim, filed on July 21, 2000, was denied on September 4, 2001, as claimant failed to establish total disability. Director's Exhibit 2. Claimant's current claim was filed on September 27, 2005. Director's Exhibit 4.

[2] Claimant also asserts that the administrative law judge erroneously refers to the report of a Dr. Kahn, attributing the death of a miner to coal workers' pneumoconiosis. Claimant asserts, however that he never submitted a report from this doctor. A review of the record shows that the report of a Dr. Kahn is not in this record. Moreover, a review of the administrative law judge's decision shows that, while he lists the findings of a Dr. Kahn, he did not consider the report in determining that claimant, a living miner, failed to establish total disability. Additionally, communication with the Office of Administrative Law Judges has established that reference to this evidence in the administrative law judge's Decision and Order was a mistake. In light of the fact that reference to this evidence did not affect the administrative law judge's findings, we hold that reference to it in the Decision and Order is harmless. *See Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984).

[3] This case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit, as the claimant's coal mining employment was in West Virginia. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*).

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 (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). 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 total disability. Director's Exhibits 1-3. 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); *see Lisa Lee Mines v. Director, OWCP* [*Rutter*], 86 F.3d 1358, 20 BLR 2-227 (4th Cir. 1996).

Section 411(c)(3) of the Act, implemented by 20 C.F.R. §718.304 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); 20 C.F.R. §718.304. The United States Court of Appeals for the Fourth Circuit, within whose jurisdiction this case arises, 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). 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, however. Rather, the administrative law judge must examine all the evidence on this 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); *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*).

After consideration of the administrative law judge's decision and the evidence of record, we conclude that the Decision and Order Denying Benefits is rational, supported by substantial evidence, consistent with applicable law, and must, therefore, be affirmed. The administrative law judge found that claimant was not entitled to the irrebuttable presumption of totally disabling pneumoconiosis, as the x-ray and medical opinion evidence failed to establish complicated pneumoconiosis at Section 718.304(a) and (c).[4]

Turning first to the x-ray evidence, the administrative law judge concluded that the new x-ray evidence did not establish complicated pneumoconiosis at Section 718.304(a). The administrative law judge found that the readings of the February 22, 2006 x-ray could not establish complicated pneumoconiosis as they were in equipoise, *i.e.*, one B reader read the x-ray as positive for complicated pneumoconiosis, while the other B reader read it as negative for complicated pneumoconiosis. The administrative law judge also found that Dr. Patel, who read the x-ray but did not classify it, noted, in his narrative report, that he could not determine whether the nodule he saw was complicated pneumoconiosis, granuloma, or neoplasm. Decision and Order at 17. The administrative law judge properly concluded, therefore, that the February 22, 2006 x-ray did not establish complicated pneumoconiosis. The administrative law judge noted that the two other new x-rays, taken on May 24, 2006 and November 6, 2006, were each read as negative for complicated pneumoconiosis by a B reader.[5] In addition, the administrative law judge noted that, of the two x-rays contained in the treatment records, the March 14, 2007 x-ray was interpreted as showing "an impression of complicated pneumoconiosis", while the April 12, 2007 was not. Decision and Order at 18; Claimant's Exhibits 1 and 2. Accordingly, on weighing all of the new x-ray evidence, the administrative law judge rationally found that it failed to establish complicated pneumoconiosis. *See Director, OWCP v. Greenwich Collieries* [*Ondecko*], 512 U.S. 267, 18 BLR 2A-1 (1994); *Staton v. Norfolk v. Western Ry. Co.*, 65 F.3d 55, 19 BLR 2-271 (6th Cir. 1995); *Woodward v. Director, OWCP*, 991 F.2d 314, 17 BLR 2-77 (6th Cir. 1994). We, therefore, affirm the

[4] Complicated pneumoconiosis cannot be established at 20 C.F.R. §718.304(b), as there is no biopsy evidence in this living miner's claim.

[5] The February 22, 2006 x-ray was read by Dr. Rasmussen, a B reader, as 1/1, Category A, by Dr. Gaziano, a B reader, for quality only as "1" and by Dr. Patel as "classifiable pneumoconiosis poorly defined nodular density in the right upper lung indeterminate for developing large opacity of complicated pneumoconiosis, granuloma or a neoplasm." Director's Exhibit 13. The x-ray was also read by Dr. Zaldivar, a B reader, as 1/2, Category O opacities. Employer's Exhibit 3. Dr. Zaldivar also read an x-ray taken on May 24, 2006 as 1/1, r,u, upper right zone Category O opacities, noting: "The above findings could be the result of infection." Employer's Exhibit 1. Dr. Rosenberg, a B reader, read the November 6, 2006 x-ray as 1/2, r/r, Category O opacities. Employer's Exhibit 2.

administrative law judge's finding that the x-ray evidence was insufficient to establish complicated pneumoconiosis at Section 718.304(a). *See Scarbro*, 220 F.3d at 255, 22 BLR at 2-100.

Turning to Section 718.304(c), the administrative law judge found that the new medical opinion evidence did not establish complicated pneumoconiosis, as both Drs. Zaldivar and Rosenberg opined that claimant did not have complicated pneumoconiosis and Dr. Porterfield did not proffer an opinion on the issue. Decision and Order at 11-12. Consequently, the administrative law judge properly found that complicated pneumoconiosis was not established on the basis of the new medical opinion evidence at Section 718.304(c), and that finding is affirmed. Consequently, we affirm the administrative law judge's finding that claimant was not entitled to the irrebuttable presumption of totally disabling pneumoconiosis at Section 718.304, by establishing complicated pneumoconiosis.

The administrative law judge next considered the evidence of total disability pursuant to 20 C.F.R. §718.204(b). The administrative law judge correctly found that total disability could not be established at Section 718.204(b)(2)(i)-(iii) because the new evidence did not include any qualifying pulmonary function studies or blood gas studies, and there was no evidence of cor pulmonale with right-sided congestive heart failure. Considering the new medical opinion evidence pursuant to Section 718.204(b)(2)(iv), the administrative law judge found that it could not establish total disability at Section 718.204(b)(2)(iv) because all three physicians who submitted opinions agreed that claimant was not "totally disabled from a respiratory standpoint."[6] Decision and Order at 20; *see Lane v. Union Carbide Corp.*, 105 F.3d 166, 21 BLR 2-34 (4th Cir. 1997). We, therefore, affirm the administrative law judge's finding that the new evidence fails to establish total disability at Section 718.204(b). In light of the forgoing, we conclude that the administrative law judge properly found that claimant failed to establish a change in an applicable condition of entitlement at Section 725.309.

[6] Dr. Porterfield found that claimant had no respiratory impairment. Director's Exhibit 13. Dr. Zaldivar opined that claimant did not have a respiratory impairment. Employer's Exhibit 5. Dr. Rosenberg opined that claimant did not have a respiratory impairment. Employer's Exhibit 4.

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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BETTY JEAN HALL
Administrative Appeals Judge