BRB No. 08-0781 BLA

C.E.S.	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
CONSOLIDATION COAL COMPANY	)	DATE ISSUED: 07/30/2009
	)	
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 of Daniel F. Solomon, Administrative Law Judge, United States Department of Labor.

Derrick W. Lefler (Gibson, Lefler and Associates), Princeton, West Virginia, for claimant.

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

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

PER CURIAM:

Employer appeals the Decision and Order on Remand (03-BLA-6661) of Administrative Law Judge Daniel F. Solomon awarding 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 September 6, 2001[1] and is before the Board for the second time. In the

[1] Claimant initially filed a claim for benefits on September 25, 1997. Director's Exhibit 1. The district director denied the claim on January 28, 1998 because claimant

initial decision, the administrative law judge credited claimant with twenty-seven years of coal mine employment,[2] and found that the new evidence established the existence of simple pneumoconiosis arising out of coal mine employment. 20 C.F.R. §§718.202(a), 718.2023(b). The administrative law judge further found that the new evidence established the existence of complicated pneumoconiosis, thereby enabling claimant to establish entitlement based on the irrebuttable presumption of total disability due to pneumoconiosis at 20 C.F.R. §718.304. The administrative law judge, therefore, found that claimant established 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. Consequently, the administrative law judge considered claimant's 2001 claim on the merits. The administrative law judge found that the evidence, as a whole, established that claimant was entitled to invocation of the irrebuttable presumption pursuant to 20 C.F.R. §718.304. Accordingly, the administrative law judge awarded benefits.

Upon employer's appeal, the Board affirmed, as unchallenged, the administrative law judge's length of coal mine employment finding, and his findings that the new evidence established the existence of simple pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.202(a), 718.203(b). *C.E.S. v. Consolidation Coal Co.*, BRB No. 07-0329 BLA (Jan. 31, 2008)(unpub.). However, the Board vacated the administrative law judge's finding that the evidence established the existence of complicated pneumoconiosis pursuant to 20 C.F.R. §718.304, and remanded the case for further consideration. *Id.*

On remand, the administrative law judge found that the evidence established the existence of complicated pneumoconiosis pursuant to 20 C.F.R. §718.304, thereby enabling claimant to establish entitlement based on the irrebuttable presumption of total disability due to pneumoconiosis at 20 C.F.R. §718.304. The administrative law judge also found that claimant was entitled to the presumption that his pneumoconiosis arose out of coal mine employment pursuant to 20 C.F.R. §718.203(b). Accordingly, the administrative law judge awarded benefits.

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did not establish total disability due to pneumoconiosis. Director's Exhibit 1. There is no indication that claimant took any further action in regard to his 1997 claim.

[2] The record indicates that claimant's coal mine employment was in West Virginia. Director's Exhibit 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*).

On appeal, employer contends that the administrative law judge erred in finding that the evidence established the existence of complicated pneumoconiosis pursuant to 20 C.F.R. §718.304. Claimant responds in support of the administrative law judge's award of benefits. The Director, Office of Workers' Compensation Programs, has not filed a response brief.

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).

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); *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 claimant did not establish total disability due to pneumoconiosis. Director's Exhibit 1. Consequently, claimant had to submit new evidence establishing total disability due to pneumoconiosis in order to obtain review of the merits of his 2001 claim. 20 C.F.R. §725.309(d)(2), (3).

Employer argues that the administrative law judge erred in finding that claimant established the existence of complicated pneumoconiosis, and was, therefore, entitled to invocation of the irrebuttable presumption of total disability due to pneumoconiosis set out at 20 C.F.R. §718.304. 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 any conflict, and make a finding of fact. *Melnick v. Consolidation Coal Co.*, 16 BLR 1-31 (1991)(*en banc*); *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).

In *Eastern Associated Coal Corp. v. Director, OWCP* [*Scarbro*], 220 F.3d 250, 22 BLR 2-93 (4th Cir. 2000), the United States Court of Appeals for the Fourth Circuit held that a single piece of relevant evidence could support an administrative law judge's finding that the irrebuttable presumption was successfully invoked "if that piece of evidence outweighs conflicting evidence in the record." *Scarbro*, 220 F.3d at 256, 22 BLR at 2-101. The Fourth Circuit further explained:

> Thus, even where some x-ray evidence indicates opacities that would satisfy the requirements of prong (a), if other x-ray evidence is available or if evidence is available that is relevant to an analysis under prong (b) or prong (c), then all of the evidence must be considered and evaluated to determine whether the evidence as a whole indicates a condition of such severity that it would produce opacities greater than one centimeter in diameter on an x-ray. Of course, if the x-ray evidence vividly displays opacities exceeding one centimeter, its probative force is not reduced because the evidence under some other prong is inconclusive or less vivid. Instead, the x-ray evidence can lose force only if other evidence affirmatively shows the opacities are not there or are not what they seem to be, perhaps because of an intervening pathology, some technical problem with the equipment used, or incompetence of the reader.

Scarbro, 220 F.3d at 256, 22 BLR at 2-101 (case citation omitted).

Employer contends that the administrative law judge erred in his consideration of the x-ray evidence pursuant to 20 C.F.R. §718.304(a). The x-ray evidence consists of four interpretations of two x-rays taken on October 29, 2001, and October 28, 2002. Director's Exhibit 17; Employer's Exhibits 1, 2. Although Dr. Patel, a B reader and Board-certified radiologist, interpreted the October 29, 2001 x-ray as positive for complicated pneumoconiosis, Dr. Scott, an equally qualified physician, interpreted this x-ray as negative for complicated pneumoconiosis. Director's Exhibit 17; Employer's Exhibit 2. The October 28, 2002 x-ray was read by Dr. Smith, a Board-certified radiologist and B reader, and Dr. Castle, a B reader, as negative for complicated pneumoconiosis. Employer's Exhibits 1, 2.

In his consideration of the x-ray evidence, the administrative law judge initially found that all of the physicians agreed that the composition of the material seen on the x-rays represented pneumoconiosis. Decision and Order on Remand at 2. The

administrative law judge next viewed the conflicting x-ray evidence in light of the computerized tomography (CT) scan evidence, which employer's medical expert, Dr. Crisalli, opined was more sensitive than a conventional x-ray in diagnosing the existence of pneumoconiosis.[3] *See* Decision and Order on Remand at 3. The administrative law judge noted that Dr. Groten, a Board-certified radiologist, interpreted claimant's February 2, 2006 and May 16, 2006 CT scans as consistent with complicated pneumoconiosis. Claimant's Exhibits 1, 2. Because Dr. Groten did not make an equivalency determination, the administrative law judge acknowledged that Dr. Groten's interpretation, standing alone, could not support a finding of complicated pneumoconiosis. Decision and Order on Remand at 3. However, the administrative law judge found that Dr. Groten's findings "significantly support [Dr.] Patel's findings as to the existence of the masses noted by Dr. Patel, as well as their nature." *Id.*

The administrative law judge next noted that Dr. Scatarige, a Board-certified radiologist, interpreted claimant's February 2, 2006 and May 16, 2006 CT scans as revealing the presence of four and five centimeter masses.[4] Claimant's Exhibits 1, 2. The administrative law judge permissibly found that Dr. Scatarige's CT scan interpretations support a finding that the lesions on claimant's x-rays were massive, "far exceeding the [one centimeter] requirement." Decision and Order on Remand at 2.

The administrative law judge, therefore, found that Dr. Groten's opinion that claimant's CT scans are consistent with complicated pneumoconiosis, and Dr. Scatarige's description of four and five centimeter lesions on claimant's CT scans, supported Dr. Patel's x-ray interpretation of complicated pneumoconiosis. In view of the evidence that CT scans are "better diagnostically," the administrative law judge permissibly attributed

[3] Dr. Crisalli opined that a computerized tomography (CT) scan, in comparison to an x-ray, "shows the lungs in far greater detail and [is] far more sensitive in terms of determining whether pneumoconiosis is present or not." Employer's Exhibit 8 at 18.

[4] Dr. Scatarige's differential diagnoses for the composition of the masses seen on the CT scans included tuberculosis, non-tuberculosis mycobacterium infection, histoplasmosis, and sarcoidosis. Claimant's Exhibits 1, 2. The administrative law judge, however, permissibly accorded less weight to Dr. Scatarige's opinion regarding the nature of the masses because the record did not corroborate his opinion. Specifically, the administrative law judge found that "[t]he record, including physical exams and histories provide no clinical correlation to any of Dr. Scateridge's [sic] diagnoses." Decision and Order on Remand at 3. The administrative law judge further found that claimant's testimony, that he had never been diagnosed with tuberculosis, was credible. *Id.* The administrative law judge also found no evidence that claimant "had ever suffered [from] any significant acute respiratory illness." *Id.*

greater weight to Dr. Patel's interpretation as to the size of the lesions on x-ray since all of the CT scan interpretations described massive lesions. Decision and Order on Remand at 3. Because it is supported by substantial evidence, we affirm the administrative law judge's finding that the x-ray evidence established the existence of complicated pneumoconiosis pursuant to 20 C.F.R. §718.304(a).[5]

Employer next contends that the administrative law judge erred in his consideration of the medical opinions of Drs. Castle and Crisalli.[6] We disagree. Although Drs. Castle and Crisalli opined that claimant did not suffer from complicated pneumoconiosis, Employer's Exhibits 8 at 13; 9 at 19, the administrative law judge permissibly accorded less weight to the their opinions because neither physician reviewed the CT scan evidence. *Underwood v. Elkay Mining, Inc.*, 105 F.3d 946, 949, 21 BLR 2-23, 2-28 (4th Cir. 1997); *Sabett v. Director, OWCP*, 7 BLR 1-299, 1-301 n.1 (1984)(noting that an administrative law judge may give less weight to a doctor's opinion that he finds supported by limited medical data); Decision and Order on Remand at 3.

Employer also argues that the administrative law judge erred in not weighing the non-qualifying pulmonary function and blood gas studies pursuant to 20 C.F.R. §718.304(c). Contrary to employer's contention, the administrative law judge, in finding the existence of complicated pneumoconiosis, acknowledged that the pulmonary function and arterial blood gas study evidence did not demonstrate a breathing impairment. Decision and Order on Remand at 4. The administrative law judge, however, noted that there was evidence that claimant suffered from breathing problems. The administrative law judge specifically noted that claimant was taking medication for his breathing problems and described "breathing difficulties, indicating spells of choking and

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[5] Employer contends that the administrative law judge erred in not according greater weight to the interpretations of Drs. Scott and Scatarige based upon their status as professors of radiology at Johns Hopkins University. *See* Director's Exhibit 29; Employer's Exhibit 1. An administrative law judge, in evaluating the relative weight of the x-ray readings, is not limited to considering the B reader and Board-certified radiologist status of the various physicians. However, while the administrative law judge could have accorded greater weight to the interpretations of Drs. Scott and Scatarige based upon their status as professors, he was not required to do so. *Harris v. Old Ben Coal Co.*, 23 BLR 1-98, 1-114 (2006)(*en banc*) (McGranery & Hall, JJ., concurring and dissenting), *aff'd on recon.*, 24 BLR 1-13 (2007)(*en banc*) (McGranery and Hall, JJ., concurring and dissenting); *Worach v. Director, OWCP*, 17 BLR 1-105 (1993).

[6] No party alleges any error in regard to the fact that the administrative law judge did not explicitly address the biopsy evidence of record pursuant to 20 C.F.R. §718.304(b). Claimant's Exhibit 4; Employer's Exhibit 11.

smothering." *Id.* The administrative law judge further noted that Dr. Crisalli found evidence of a mild diffusion impairment. *Id.* Thus, the administrative law judge adequately addressed the evidence regarding the extent of claimant's pulmonary impairment.

Employer's remaining statements regarding the administrative law judge's consideration of the evidence pursuant to 20 C.F.R. §718.304 amount to a request to reweigh the evidence of record. Such a request is beyond the Board's scope of review. *See Cox v. Benefits Review Board*, 791 F.2d 445, 9 BLR 2-46 (6th Cir. 1986); *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-113 (1989); *Sarf v. Director, OWCP*, 10 BLR 1-119 (1987).

Because it is supported by substantial evidence, we affirm the administrative law judge's finding that Dr. Patel's x-ray interpretation of complicated pneumoconiosis is entitled to the greatest weight. *See Scarbro*, 220 F.3d at 256, 22 BLR at 2-101; Decision and Order on Remand at 2-3. We, therefore, affirm the administrative law judge's finding that the evidence established the existence of complicated pneumoconiosis, thereby enabling claimant to establish entitlement based on the irrebuttable presumption of total disability due to pneumoconiosis at 20 C.F.R. §718.304. In light of this finding, we also affirm the administrative law judge's finding that claimant established that one of the applicable conditions of entitlement had changed since the date upon which the denial of claimant's prior claim became final.[7] 20 C.F.R. §725.309.

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[7] Because no party challenges the administrative law judge's finding that the evidence establishes that claimant's pneumoconiosis arose out of his coal mine employment pursuant to 20 C.F.R. §718.203(b), this finding is affirmed. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

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