BRB No. 09-0647 BLA

CARNIS H. DELP	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
EASTERN ASSOCIATED COAL CORPORATION	)	DATE ISSUED: 07/29/2010
	)	
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 Denying Benefits of Jeffrey Tureck, Administrative Law Judge, United States Department of Labor.

S. F. Raymond Smith (Juliet Walker Rundle & Associates), Pineville, West Virginia, for claimant.

Laura Metcoff Klaus (Greenberg Traurig LLP), Washington, D.C., for employer.

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

PER CURIAM:

Claimant appeals the Decision and Order Denying Benefits (2008-BLA-05345) of Administrative Law Judge Jeffrey Tureck on claimant's request for modification of the denial of 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).[1] The

[1] By Order dated March 30, 2010, the Board provided the parties with the opportunity to address the impact on this case, if any, of Section 1556 of Public Law No.

administrative law judge credited claimant with thirty-five years of coal mine employment, based on employer's concession, and adjudicated this claim pursuant to the regulations contained in 20 C.F.R. Part 718.[2] The administrative law judge found that the newly submitted evidence was insufficient to establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(i)-(iv). The administrative law judge also determined that the newly submitted evidence was insufficient to establish the presence of complicated pneumoconiosis and, therefore, was insufficient to establish invocation of the irrebuttable presumption of total disability due to pneumoconiosis under 20 C.F.R. §718.304. Consequently, the administrative law judge found that claimant did not demonstrate a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.310. Accordingly, the administrative law judge denied claimant's request for modification and denied benefits.

On appeal, claimant contends that the administrative law judge erred in finding

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111-148, which amended the Black Lung Benefits Act (the Act) with respect to the entitlement criteria for certain claims. *Delp v. Eastern Associated Coal Corp.*, BRB No. 09-0647 BLA (Mar. 30, 2010)(unpub. Order). The parties have responded and assert that Section 1556 does not apply to this claim, as it was filed before January 1, 2005. Based on the parties' responses, and our review, we hold that the recent amendments to the Act are not applicable, based on the filing date of the claim.

[2] Claimant filed his initial claim for benefits on April 7, 1987. Director's Exhibit 1. This claim was denied by the district director on September 16, 1987, because the evidence did not establish that claimant was totally disabled by pneumoconiosis. *Id*. Claimant took no further action, until filing a second claim on November 9, 1989. Director's Exhibit 2. The district director denied this claim on January 10, 1990, as claimant failed to establish total disability. *Id*. Claimant filed his third claim on September 12, 1994, which was denied by the district director on February 8, 1995, on the ground that claimant did not establish that he is totally disabled by pneumoconiosis. *Id*. Claimant filed his most recent claim on June 17, 2002. Director's Exhibit 5. In a Decision and Order issued on October 31, 2005, Administrative Law Judge William S. Colwell found that the newly submitted evidence was insufficient to establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(i)-(iv) or invocation of the irrebuttable presumption of total disability due to pneumoconiosis pursuant to 20 C.F.R. §718.304. Director's Exhibit 52. Consequently, Judge Colwell found claimant did not demonstrate a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309 and denied benefits. *Id*. Pursuant to claimant's appeal in *Delp v. Eastern Associated Coal Corp.*, BRB No. 06-0191 BLA (Sept. 22, 2006)(unpub.), the Board affirmed the denial of benefits. Director's Exhibit 59. Claimant filed a request for modification on October 16, 2006. Director's Exhibit 60.

that the evidence did not establish invocation of the irrebuttable presumption of total disability due to pneumoconiosis pursuant to 20 C.F.R. §718.304. Employer responds, urging affirmance of the administrative law judge's denial of benefits. The Director, Office of Workers' Compensation Programs, has declined to respond to claimant's appeal.[3]

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.[4] 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 establish entitlement to benefits in a living miner's claim, claimant must demonstrate, by a preponderance of the evidence, that he has pneumoconiosis arising out of coal mine employment, that he is totally disabled and that his disability is due to pneumoconiosis. 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 a finding of entitlement. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-112 (1989); *Trent v. Director, OWCP*, 11 BLR 1-26, 1-27 (1987).

When 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 shall be limited to those conditions upon which the prior denial was based." 20 C.F.R. §725.309(d)(2). Claimant's most recent prior claim was denied because he did not prove that he is totally disabled. Accordingly, claimant must establish this element of entitlement in order to have his 2002 subsequent claim considered on the merits. To establish a basis for modification with respect to the denial of his subsequent claim, claimant must demonstrate that he is now totally disabled or that Judge Colwell's Decision and Order contained a mistake in a determination of fact. 20 C.F.R. §725.310.

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[3] We affirm, as unchallenged on appeal, the administrative law judge's finding that the newly submitted evidence was insufficient to establish total disability pursuant to 20 C.F.R. §718.204(b)(2). *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

[4] The record indicates that claimant's coal mine employment was in West Virginia. Director's Exhibit 1. 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*).

Section 411(c)(3) of the Act, 30 U.S.C. §921(c)(3), as implemented by 20 C.F.R. §718.304, creates an irrebuttable presumption that the miner is totally disabled due to pneumoconiosis if (A) an x-ray of the miner's lungs shows at least one opacity greater than one centimeter in diameter; (B) a biopsy reveals "massive lesions" in the lungs; or (C) a diagnosis by other means reveals a result equivalent to (A) or (B). In *Director, OWCP v. Eastern Coal Corp.* [*Scarbro*], 220 F.3d 250, 22 BLR 2-93 (4th Cir. 2000), the United States Court of Appeals for the Fourth Circuit stated that, because prong (A) sets out an entirely objective scientific standard, *i.e.*, an opacity on an x-ray greater than one centimeter, an administrative law judge must determine whether the evidence relevant to prongs (B) and (C), "indicates a condition of such severity that it would produce opacities greater than one centimeter in diameter on an x-ray." *Scarbro*, 220 F.3d at 256, 22 BLR at 2-101; see *Double B Mining, Inc. v. Blankenship*, 177 F.3d 240, 243, 22 BLR 2-554, 2-560 (4th Cir. 1999).

Pursuant to 20 C.F.R. §718.304, the administrative law judge noted that the newly submitted evidence consisted of readings of digital x-rays and CT scans, which he was required to consider under 20 C.F.R. §718.304(c). Decision and Order at 3-4. The administrative law judge initially addressed three readings of two digital x-rays obtained on May 25, 2006 and July 30, 2007. Director's Exhibits 60, 72; Employer's Exhibit 1. Dr. Groten read the May 25, 2006 digital x-ray as "most likely reflecting complicated pneumoconiosis." Director's Exhibit 60. Dr. Scott interpreted the same digital x-ray as showing changes "most likely due to tuberculosis or histoplasmosis, partly healed." Director's Exhibit 72. Dr. Wheeler read the July 30, 2007 digital x-ray and identified the masses as "conglomerate granulomatous disease." Employer's Exhibit 1. The administrative law judge credited Dr. Scott's negative interpretation of the May 25, 2006 digital x-ray, along with Dr. Wheeler's negative interpretation of the July 30, 2007 digital x-ray, over Dr. Groten's positive interpretation of the May 25, 2006 digital x-ray, based upon the superior qualifications of Drs. Scott and Wheeler.[5]

[5] In considering the qualifications of Drs. Scott, Wheeler and Groten, the administrative law judge stated:

> Both Dr. Scott and Dr. Wheeler are [B]oard-certified radiologists and B[]readers (physicians certified by the National Institute of Occupational Safety and Health as having demonstrated expertise in interpreting x-rays for pneumoconiosis) ([Employer's Exhibit] 72). They are also Associate Professors of Radiology at The Johns Hopkins Medical Institutions and both have published extensively in peer-reviewed journals on the subject of diagnosing pulmonary disease using radiological techniques. Dr. Groten's *curriculum vitae* was not provided.

Decision and Order at 4.

With respect to the CT scan evidence, the administrative law judge considered three readings of two newly submitted CT scans dated May 25, 2006 and July 31, 2007. Director's Exhibits 60, 72; Employer's Exhibit 3. Dr. Groten read the May 25, 2006 CT scan and determined that there were "findings most likely reflecting complicated pneumoconiosis." Director's Exhibit 60. Dr. Wheeler interpreted this same CT scan and identified the masses as "conglomerate granulomatous disease, TB or histoplasmosis." Director's Exhibit 72. Dr. Wheeler reviewed the July 31, 2007 CT scan and identified the masses as "conglomerate granulomatous disease." Employer's Exhibit 3. The administrative law judge found that the preponderance of the CT scan evidence was negative for the existence of complicated pneumoconiosis pursuant to 20 C.F.R. §718.304(c). Decision and Order at 5. The administrative law judge gave greatest weight to Dr. Wheeler's negative interpretations of the May 25, 2006 and July 31, 2007 CT scans, over Dr. Groten's positive interpretation of the May 25, 2006 CT scan, based upon Dr. Wheeler's superior qualifications.[6] *Id.* The administrative law judge concluded, therefore, that the newly submitted evidence was insufficient to establish the existence of complicated pneumoconiosis under 20 C.F.R. §718.304(c). *Id.*

Claimant asserts that the administrative law judge erred in failing to make the required equivalency determination when considering the evidence at 20 C.F.R. §718.304(c). Claimant further maintains that the administrative law judge erred in finding that the digital x-rays and CT scans were insufficient to invoke the irrebuttable presumption, based upon the conclusions of employer's physicians that the masses identified on the digital x-rays and CT scans of claimant's lungs were not complicated pneumoconiosis.

Claimant's allegations of error are without merit. Pursuant to 20 C.F.R. §718.304, the condition which invokes the irrebuttable presumption of total disability due to pneumoconiosis must be "a chronic dust disease of the lung." Thus, the diagnosis of a large opacity that is equivalent to the size specified in prong (A) is insufficient, by itself, to establish invocation of the irrebuttable presumption. *See Melnick v. Consolidation Coal Co.*, 16 BLR 1-31, 1-33 (1991)(*en banc*). In the present case, the administrative law judge acted within his discretion as fact-finder in according greater weight to the digital x-ray readings in which Drs. Scott and Wheeler determined that the large opacities they observed were attributable to lung conditions unrelated to dust exposure, because their

[6] In considering the qualifications of Dr. Wheeler regarding the interpretation of CT scans, the administrative law judge stated that, in addition to his radiological credentials, "Dr. Wheeler has extraordinary expertise in computerized tomography." Decision and Order at 5, citing Employer's Exhibit 3. A review of Dr. Wheeler's *curriculum vitae* indicates that he has co-authored several peer-reviewed articles concerning the use of CT scans to diagnose pulmonary conditions and has made numerous presentations on this topic. Employer's Exhibit 3.

qualifications were superior to those of Dr. Groten. *See Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 533, 21 BLR 2-323, 2-335 (4th Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 441, 21 BLR 2-269, 2-275-76 (4th Cir. 1997); *Adkins v. Director, OWCP*, 958 F.2d 49, 52, 16 BLR 2-61, 66 (4th Cir. 1992); Decision and Order at 4.

With respect to the CT scan evidence, the administrative law judge rationally concluded, "[a]ssuming that the large lesions noted in the [m]iner's lungs are at least equal in size to one centimeter opacities diagnosed by conventional x-rays, Dr. Wheeler effectively explain[ed] why the lesions cannot be diagnostic of complicated coal workers' pneumoconiosis." *See Hicks*, 138 F.3d at 533, 21 BLR at 2-335; *Akers*, 131 F.3d at 441, 21 BLR at 2-275-76; Decision and Order at 5. In addition, the administrative law judge acted within his discretion in determining that Dr. Wheeler's opinion, that the CT scan did not support a finding of complicated pneumoconiosis, was entitled to greater weight than Dr. Groten's contrary opinion, based upon Dr. Wheeler's superior qualifications. *Id*.

Because claimant raises no further challenge to the administrative law judge's weighing of the digital x-ray and CT scan evidence of record, we affirm the administrative law judge's findings at 20 C.F.R. §718.304(c) and his determination that claimant did not establish the existence of complicated pneumoconiosis at 20 C.F.R. §718.304(a)-(c).[7] We also affirm the administrative law judge's finding that claimant did not establish a change in an applicable condition of entitlement under 20 C.F.R. §§725.309(d) and, therefore, did not establish a change in condition under 20 C.F.R. §725.310. *See Scarbro*, 220 F.3d at 256, 22 BLR at 2-101; *Gollie v. Elkay Mining Corp*., 22 BLR 1-306, 1-311 (2003).

In addition, we affirm the administrative law judge's finding that claimant did not establish a mistake in a determination of fact in Judge Colwell's 2005 Decision and Order, as it is rational and supported by substantial evidence. Consequently, we affirm

[7] Pursuant to 20 C.F.R. §718.107(b), the administrative law judge was required to consider whether the parties established that the digital x-ray and CT scan readings are medically acceptable and relevant to establishing the existence of complicated pneumoconiosis. *See Webber v. Peabody Coal Co.*, 23 BLR 1-123 (2006) (*en banc*)(Boggs, J., concurring), *aff'd on recon.*, 23 BLR 1-261 (2007) (*en banc*) (Boggs, J., concurring); *Harris v. Old Ben Coal Co.*, 23 BLR 1-98 (2006) (*en banc*) (McGranery & Hall, JJ., concurring and dissenting), *aff'd on recon.*, 24 BLR 1-13 (2007) (*en banc*) (McGranery & Hall, J.J., concurring and dissenting). The omission of this determination does not constitute error requiring remand, however, in light of the administrative law judge's determination that the digital x-ray and CT scan readings were insufficient to establish the existence of complicated pneumoconiosis at 20 C.F.R. §718.304(c). *See Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984).

the administrative law judge's finding that claimant did not establish a basis for modification at 20 C.F.R. §725.310. *Jessee v. Director, OWCP*, 5 F.3d 723, 725, 18 BLR 2-26, 2-28 (4th Cir. 1993).

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