BRB No. 02-0689 BLA

ROBERT A. BELL, JR.	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	DATE ISSUED:
	)	
CONSOLIDATION COAL COMPANY	)	
	)	
Employer-Respondent	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
	)	DECISION AND ORDER
Party-in-Interest		

Appeal of the Decision and Order - Rejection of Claim of Edward Terhune Miller, Administrative Law Judge, United States Department of Labor.

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

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

Before: SMITH, HALL and GABAUER, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order - Rejection of Claim (2001-BLA-0053) of Administrative Law Judge Edward Terhune Miller 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).[1] The administrative law judge determined that this case involves a request for modification of the denial of the miner's original 1996 claim by Administrative Law Judge Stuart A. Levin, in a Decision and Order issued on November 10, 1997.[2] Herein, adjudicating the claim pursuant to 20 C.F.R. Part 718, the administrative law judge credited claimant with eleven and three-quarters years of coal mine employment. Addressing claimant's request for modification pursuant to 20 C.F.R. §725.310 (2000),[3] the administrative law judge found the evidence of

[1] The Department of Labor has amended the regulations implementing the Federal Coal Mine Health and Safety Act of 1969, as amended. These regulations became effective on January 19, 2001, and are found at 20 C.F.R. Parts 718, 722, 725, and 726 (2002). All citations to the regulations, unless otherwise noted, refer to the amended regulations.

[2] Claimant filed his initial application for benefits on April 19, 1996. Director's Exhibit 1. In a Decision and Order issued November 10, 1997, Administrative Law Judge Stuart A. Levin denied benefits, finding that while claimant established the existence of pneumoconiosis arising out of coal mine employment, the evidence was insufficient to establish a totally disabling respiratory or pulmonary impairment. Director's Exhibit 60. The Board affirmed Judge Levin's denial of benefits. *Bell v. Consolidation Coal Co.*, 98-0294 BLA (Nov. 19, 1998)(unpub.); Director's Exhibit 65. Claimant filed his request for modification on December 19, 1998. Director's Exhibit 66.

[3] The amendments to the regulation at 20 C.F.R. §725.310 (2000) do not

record insufficient to establish a mistake in a determination of fact. The administrative law judge further found that the newly submitted evidence, in conjunction with the old evidence, was insufficient to establish either the existence of complicated pneumoconiosis pursuant to 20 C.F.R. §718.304 or a totally disabling respiratory impairment pursuant to 20 C.F.R. §718.204(b)(2). Consequently, the administrative law judge found the evidence insufficient to establish a change in conditions. Accordingly, the administrative law judge denied claimant's request for modification.

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apply to claims, such as the instant claims, which were pending on January 19, 2001. *See* 20 C.F.R. §725.2.

On appeal, claimant contends that the administrative law judge erred in finding the medical evidence insufficient to establish the existence of complicated pneumoconiosis pursuant to Section 718.304. In particular, claimant contends that the administrative law judge erred in his weighing of the x-ray and CT scan evidence of record. In response, employer urges affirmance of the administrative law judge's denial of benefits as supported by substantial evidence. The Director, Office of Workers' Compensation Programs, has filed a letter stating that he will not file a response brief in this appeal.[4]

The Board's scope of review is defined by statute. The administrative law judge's Decision and Order must be affirmed if it is supported by substantial evidence, is rational, and is in accordance with applicable law. 33 U.S.C. §921(b)(3), as incorporated into the Act by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

After consideration of the administrative law judge's Decision and Order and the relevant evidence of record, we conclude that substantial evidence supports the administrative law judge's findings that the medical evidence of record is insufficient to establish the existence of complicated pneumoconiosis pursuant to Section 718.304. In considering the x-ray evidence pursuant to Section 718.304(a), the administrative law judge correctly stated that the record contains forty-one x-ray interpretations of six films. Of these interpretations, only Dr. Forehand's reading of the July 1, 1996 film and Dr. DePonte's reading of the January 5, 2001 film were positive for the existence of complicated pneumoconiosis, based on their classification of Category A large opacities. Decision and Order at 19; Director's Exhibit 22; Claimant's Exhibit 2. However, the administrative law judge reasonably relied on the preponderance of the x-ray interpretations by physicians with equal or superior professional qualifications that he found were negative for complicated pneumoconiosis because the physicians did not indicate that large opacities were present. Decision and Order at 19; Director's Exhibits 9, 17-21, 23, 24, 26, 40, 43, 84, 85, 91, 92; Employer's

[4] The parties do not challenge the administrative law judge's decision to credit the miner with eleven and three-quarters years of coal mine employment, or his findings pursuant to 20 C.F.R. §§718.204(b)(2) and 718.304(b). These findings are therefore affirmed. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

Exhibits 1, 2, 7, 11-15, 17, 18, 20; 20 C.F.R. §718.304(a); *see Handy v. Director, OWCP*, 16 BLR 1-73 (1990); *see also Melnick v. Consolidation Coal Co.*, 16 BLR 1-31 (1991)(*en banc*).

Contrary to claimant's contention, the administrative law judge considered the x-ray interpretations in which the physicians identified "ax" abnormalities, *i.e.*, coalescence of small pneumoconiotic nodules, but rationally found these films insufficient to establish complicated pneumoconiosis as the physicians did not opine that the coalescence resulted in the formation of a large opacity. Decision and Order at 19; Director's Exhibits 84, 92; Employer's Exhibits 1, 2, 11, 12, 14, 18. In addition, we reject claimant's contention that, based on Dr. Wheeler's finding of a 2.5 centimeter mass on the CT scan, the coalescence noted in the x-ray interpretations by Drs. Dahhan, Hippensteel, Shipley, Wiot, Spitz and Perme, is most likely 2.5 centimeters and, therefore, is complicated pneumoconiosis. Claimant's Brief at 8-9. The regulations specifically require a diagnosis of large opacities by x-ray and, therefore, a diagnosis solely of coalescence of opacities is not sufficient to establish complicated pneumoconiosis pursuant to Section 718.304(a). 20 C.F.R. §718.304(a); *Handy*, 16 BLR at 1-75. Herein, none of the physicians who interpreted the x-ray films as showing coalescence of opacities stated the specific size of the coalescence but all noted that the x-rays did not show any large opacities. *See* Director's Exhibits 94, 92; Employer's Exhibits 1, 2, 11, 12, 14, 18. Because the regulations require the diagnosis of large opacities, the administrative law judge properly determined that these x-ray interpretations were insufficient to establish the existence of complicated pneumoconiosis. 20 C.F.R. §718.304(a); *Handy*, 16 BLR at 1-75-76.

Moreover, contrary to claimant's contention, it was not improper for the administrative law judge to credit the x-ray interpretations of Drs. Wheeler, Scott and Kim on the issue of the existence of complicated pneumoconiosis even though the physicians did not diagnose simple pneumoconiosis, a finding contrary to the administrative law judge's determination on that issue. The regulations do not require an initial determination of the existence of simple pneumoconiosis. Rather, the invocation of the irrebuttable presumption of total disability due to pneumoconiosis is based solely on the determination of the existence of complicated pneumoconiosis under the criteria set forth at Section 718.304. 20 C.F.R. §718.304; *see Lester v. Director, OWCP*, 993 F.2d 1143, 17 BLR 2-114 (4th Cir. 1993)*; see also Eastern Associated Coal Corp. v. Director, OWCP* [*Scarbro*], 220 F.3d 250, 22 BLR 2-93 (4th Cir. 2000). Since the determination of whether complicated pneumoconiosis exists is a finding of fact

which must be made by the administrative law judge, *see Sumner v. Blue Diamond Coal Co.*, 12 BLR 1-74 (1988); *see also Neeley v. Director, OWCP*, 11 BLR 1-85 (1988), the administrative law judge's crediting of the interpretations of Drs. Wheeler, Scott and Kim was within a reasonable exercise of his discretion as fact-finder. *Id*. As the administrative law judge has considered all of the relevant x-ray evidence, we affirm his finding that claimant has not established the existence of complicated pneumoconiosis pursuant to Section 718.304(a).

In challenging the administrative law judge's findings under Section 718.304(c), claimant only contends that the administrative law judge's discrediting of Dr. Navani's CT scan interpretation was improper. However, in weighing the relevant evidence pursuant to Section 718.304(c), the administrative law judge found that the record contains fourteen interpretations of two CT scans dated November 7, 1996 and January 12, 1998, and six relevant medical opinions. Decision and Order at 20; Director's Exhibits 71-75, 82-84; Claimant's Exhibits 1, 3; Employer's Exhibits 3-6, 8-10, 16, 19, 21. Of the CT scan interpretations, the administrative law judge found that interpretations by Drs. Bassali and Navani of the January 12, 1998 CT scan indicated the presence of complicated pneumoconiosis. Decision and Order at 20; Director's Exhibits 74, 75. The administrative law judge found the interpretation by Dr. Bassali could be sufficient, if credited over all of the contrary evidence, to establish the existence of complicated pneumoconiosis. Decision and Order at 20; Director's Exhibit 74.

The administrative law judge found that Dr. Navani did not adequately describe the size or disease process behind the formation of the opacity he indicated as being present, and also provided the interpretation on an improper medical form.[5] Decision and Order at 20-21; Director's Exhibit 75. The administrative law judge found that Dr. Navani's interpretation was insufficient to establish the existence of complicated pneumoconiosis. Noting that the only evidence supportive of a finding of complicated pneumoconiosis were the CT scan interpretations of Drs. Bassali and Navani, but that the record also contains

[5] In discussing Dr. Navani's CT scan interpretation, the administrative law judge found that the physician's use of an ILO form was improper. Decision and Order at 20. We note, however, that the regulations do not provide specific quality standards or guidelines for the interpretation of CT scan evidence. *See* 20 C.F.R. Part 718; *see generally Melnick v. Consolidation Coal Co.*, 16 BLR 1-31, 34 (1991)(*en banc*).

twelve CT scan interpretations which were negative for complicated pneumoconiosis and six medical opinions that indicated that claimant was not suffering from pneumoconiosis, the administrative law judge found that the medical evidence of record did not support a finding of complicated pneumoconiosis pursuant to Section 718.304(c). Decision and Order at 21. Inasmuch as the administrative law judge considered all of the relevant medical evidence and found that the weight of this evidence was insufficient to support a finding of complicated pneumoconiosis, we affirm his finding as supported by substantial evidence. 20 C.F.R. §718.304(c); *see generally Lester v. Director, OWCP*, 993 F.2d 1143, 17 BLR 2-114 (4th Cir. 1993). Moreover, as claimant does not otherwise challenge the administrative law judge's determination that claimant failed to establish a change in conditions pursuant to Section 725.310 (2000), we affirm his finding that the evidence of record is insufficient to support modification.[6] 20 C.F.R. §725.310 (2000); *Jessee v. Director, OWCP*, 5 F.3d 723, 18 BLR 2-26 (4th Cir. 1993).

[6] In addressing the issue of mistake in a determination of fact, the administrative law judge determined that Judge Levin did not accurately consider Dr. Forehand's readings of the July 1, 1996 x-ray film and that Judge Levin misidentified the date of the August 17, 1993 pulmonary function study. Decision and Order at 15. However, the administrative law judge found that these errors had no effect on the ultimate outcome of the case. *Id*. In addition, the administrative law judge reviewed the entirety of Judge Levin's Decision and Order and found that the record supported Judge Levin's denial of benefits. Therefore, the administrative law judge found that there is no mistake in a determination of fact in Judge Levin's findings. Since the parties do not challenge the above findings, they are affirmed. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

Accordingly, the administrative law judge's Decision and Order - Rejection of Claim is affirmed.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge

PETER A. GABAUER, Jr.
Administrative Appeals Judge