BRB No. 06-0820 BLA

KENNETH L. ATKINS	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	DATE ISSUED: 06/26/2007
	)	
WESTMORELAND COAL COMPANY	)	
	)	
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 on Remand of John M. Vittone, Chief Administrative Law Judge, United States Department of Labor.

Joseph E. Wolfe (Wolfe Williams & Rutherford), Norton, 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 McGRANERY, Administrative Appeals Judges.

DOLDER, Chief Administrative Appeals Judge:

Claimant appeals the Decision and Order on Remand (00-BLA-0348) of Chief Administrative Law Judge John M. Vittone rendered on a duplicate 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] Claimant filed this claim on March 9, 1999.[2] Director's Exhibit 1. It is now before the Board for the fourth time. The Board discussed previously this claim's full procedural history.[3] The relevant procedural history of this claim is as follows. In a Decision and Order on Remand issued on October 18, 2004, Administrative Law Judge Stuart A. Levin awarded benefits, finding that claimant was entitled to the irrebuttable presumption of total disability due to pneumoconiosis pursuant to 20 C.F.R. §718.304, because he established complicated pneumoconiosis based upon the weight of the x-ray and medical opinion evidence. In its most recent decision, the Board vacated the award, and remanded the case to a different administrative law judge for reconsideration of whether claimant established the existence of complicated pneumoconiosis. *Atkins v. Westmoreland Coal Co.*, BRB No. 05-0170 BLA (Oct. 13, 2005)(unpub.)(McGranery, J., dissenting).

On remand, Chief Administrative Law Judge John M. Vittone (the administrative law judge) found that claimant did not establish entitlement to the irrebuttable presumption of total disability due to pneumoconiosis pursuant to Section 718.304, based upon a preponderance of the new chest x-ray evidence and new medical opinion evidence. The administrative law judge also found that the new evidence did not establish total disability pursuant to 20 C.F.R. §718.204. The administrative law judge therefore concluded that claimant did not establish a change in an applicable condition 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 first claim for benefits on November 30, 1993. Director's Exhibit 36-1. The prior claim was denied on September 29, 1997, when the Board affirmed Administrative Law Judge Vivian Schreter-Murray's finding that claimant did not establish that he was totally disabled by a respiratory or pulmonary impairment. *Atkins v. Westmoreland Coal Co.*, BRB No. 97-0194 BLA (Sept. 29, 1997)(unpub.); Director's Exhibit 36-62.

[3] *Atkins v. Westmoreland Coal Co.*, BRB No. 05-0170 BLA (Oct. 13, 2005)(unpub.)(McGranery, J., dissenting); *Atkins v. Westmoreland Coal Co.*, BRB No. 02-0877 BLA (Sept. 9, 2003)(unpub.)(McGranery, J., dissenting); *Atkins v. Westmoreland Coal Co.*, BRB No. 01-0318 BLA (Jan. 18, 2002)(unpub.)(McGranery, J., dissenting).

entitlement pursuant to 20 C.F.R. §725.309(d).[4] Accordingly, the administrative law judge denied benefits.

On appeal, claimant challenges the administrative law judge's finding pursuant to Section 718.304.[5] Employer responds in support of the denial of benefits. The Director, Office of Workers' Compensation Programs, did not file 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. Failure to establish any one of these elements precludes 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).

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 there has been a material change in conditions. 20 C.F.R. §725.309(d)(2000). The United States Court of Appeals for the Fourth Circuit, within whose jurisdiction this case arises, has held that pursuant to Section 725.309(d)(2000), the administrative law judge must consider all of the new evidence to determine whether claimant has proven at least one of the elements of entitlement previously adjudicated against him. *Lisa Lee Mines v. Director, OWCP [Rutter]*, 86 F.3d 1358, 1362, 20 BLR

---

[4] Chief Administrative Law Judge John M. Vittone should have considered whether the new evidence established a "material change in conditions" pursuant to 20 C.F.R. §725.309(d)(2000), because claimant's duplicate claim was filed before the date of the regulations that took effect on January 19, 2001. *See* 20 C.F.R. §725.2(c). Any error in this respect was harmless. *See Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984).

[5] We affirm the administrative law judge's finding that the new evidence of record did not establish total disability under 20 C.F.R. §718.204, independent of the presumption at 20 C.F.R. §718.304, because the finding is unchallenged on appeal. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

2-227, 2-235 (4th Cir. 1996), *rev'g en banc*, 57 F.3d 402, 19 BLR 2-223 (4th Cir. 1995). If so, claimant has established a material change in conditions and the administrative law judge must then determine whether all of the record evidence, old and new, supports a finding of entitlement. *Id.*

Claimant argues that the administrative law judge erred in finding that the new evidence did not establish the existence of complicated pneumoconiosis pursuant to Section 718.304. Section 411(c)(3) of the Act, as implemented by Section 718.304, 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.[6]

---

[6] Section 718.304 provides in relevant part:

There is an irrebuttable presumption that a miner is totally disabled due to pneumoconiosis . . . if such miner is suffering . . . from a chronic dust disease of the lung which:

> (a) When diagnosed by chest X-ray . . . yields one or more large opacities (greater than 1 centimeter in diameter) and would be classified in Category A, B, or C . . .; or
>
> (b) When diagnosed by biopsy or autopsy, yields massive lesions in the lung; or
>
> (c) When diagnosed by means other than those specified in paragraphs (a) and (b) of this section, would be a condition which could reasonably be expected to yield the results described in paragraph (a) or (b) of this section had diagnosis been made as therein described: *Provided, however,* That any diagnosis made under this paragraph shall accord with acceptable medical procedures.

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 Section 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 Am. Coal Corp.*, 2 BLR 1-199 (1979), *aff'd sub nom. Director, OWCP v. North Am. 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, within whose jurisdiction this case arises, 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. [Citation omitted]. 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 that 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.

Claimant's sole argument on appeal is that the administrative law judge misapplied *Scarbro* to require claimant to disprove the existence of other lung diseases in order to establish the presence of large opacities. This argument lacks merit. The administrative law judge found that the negative x-ray readings by Drs. Baek, Binns, Gogineni, Kim, Scott, Shipley, and Spitz undercut the positive x-rays readings by

establishing that the opacities in the miner's lungs were not coal dust related.[7] Contrary to claimant's contention, the administrative law judge permissibly found that claimant did not meet his burden to establish the presence of large opacities, when all the conflicting x-ray evidence was considered. *See Scarbro,* 220 F.3d at 256, 22 BLR at 2-101. Because the administrative law judge's analysis of the x-ray evidence is consistent with *Scarbro*, we reject claimant's argument.

In weighing the new x-ray evidence at Section 718.304(a), the administrative law judge found that the persuasive x-ray evidence consisted of the x-ray readings by Drs. DePonte and Wheeler, both of whom are Board-certified radiologists and B readers. Decision and Order on Remand at 6. Dr. DePonte interpreted the May 3, 1999 x-ray as positive for complicated pneumoconiosis. Director's Exhibit 19. Dr. DePonte simultaneously compared the May 3, 1999 x-ray to x-rays dated January 22, 1996 and December 3, 1997. *Id*. Dr. Wheeler read all of the new x-rays, dated April 19, 1999, May 3, 1999, August 17, 1999, and September 28, 1999, as negative for pneumoconiosis. Director's Exhibit 25; Employer's Exhibits 5, 9, 10. Finding that "equally credible readings by the highly qualified physicians reach[ed] opposite results," the administrative law judge found that the "persuasive x-ray evidence" was "evenly balanced." Decision and Order on Remand at 6. Claimant does not challenge this finding, and it is supported by substantial evidence. Consequently, we affirm the administrative law judge's finding that the persuasive x-ray evidence was evenly balanced, and that therefore, claimant did not carry his burden to establish complicated pneumoconiosis pursuant to Section 718.304(a). *See Director, OWCP v. Greenwich Collieries [Ondecko]*, 512 U.S. 267, 281, 18 BLR 2A-1, 2A-12 (1994); *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

Moreover, in weighing the new medical opinion evidence pursuant to Section 718.304(c), the administrative law judge found that the

> [m]edical opinions preponderantly find the absence of complicated pneumoconiosis and these opinions are supported by a preponderance of the chest x-ray evidence as previously noted and Claimant has not demonstrated the presence of complicated pneumoconiosis pursuant to the Board's instructions under *Island Creek Coal Co. v. Compton*, 211 F.3d 203 (4th Cir. 2000).

---

[7] The negative x-ray readings attributed the abnormalities that were detected to granulomatous disease, tuberculosis, or cancer. Decision and Order on Remand at 7; Director's Exhibits 25, 27, 28; Employer's Exhibits 5, 6, 9, 10, 14.

Decision and Order on Remand at 7. Thus, weighing the new x-ray and medical opinion evidence together, the administrative law judge found that the medical opinions that did not diagnose complicated pneumoconiosis were supported by a preponderance of the x-ray evidence, and he concluded that claimant did not establish the existence of complicated pneumoconiosis at Section 718.304. Claimant does not challenge these findings, and they are supported by substantial evidence. *Ondecko*, 512 U.S. at 281, 18 BLR at 2A-12; *Scarbro*, 220 F.3d at 256, 22 BLR at 2-101; *Lester v. Director, OWCP*, 993 F.2d 1143, 1145, 17 BLR 2-114, 2-117 (4th Cir. 1993); *Melnick*, 16 BLR at 1-33; *Skrack*, 6 BLR at 1-711; Decision and Order on Remand at 7; Director's Exhibits 5, 19, 25-28; Employer's Exhibits 3-5, 7, 9-10, 13-14. Consequently, we affirm the administrative law judge's finding that claimant is not entitled to invocation of the irrebuttable presumption of total disability due to pneumoconiosis at Section 718.304, and is not entitled to benefits, because claimant did not establish a material change in conditions pursuant to Section 725.309(d)(2000).

Accordingly, the administrative law judge's Decision and Order on Remand denying benefits is affirmed.

SO ORDERED.

_____

NANCY S. DOLDER, Chief
Administrative Appeals Judge

I concur:

_____

ROY P. SMITH
Administrative Appeals Judge

McGRANERY, Administrative Appeals Judge, dissenting:

I respectfully dissent from the majority's determination to affirm the fourth administrative law judge decision in this case, which is the first to deny benefits. When the Board remanded the case at bar for the third time, after Administrative Law Judge Stuart A. Levin had issued three decisions awarding benefits, the Board directed that the case be reassigned to a different administrative law judge. Accordingly, Chief Administrative Law Judge John M. Vittone assigned the case to himself. He stated that

he agreed with my dissent in the prior decision, that Judge Levin had thoroughly explained his determination that Dr. DePonte's simultaneous x-ray readings are more credible. Decision and Order on Remand at 6. Chief Judge Vittone explained, however, that he was compelled to reject that conclusion, "[b]ased on the Board's instructions and rejection of Judge Levin's rationale. . . ." *Id*. Chief Judge Vittone also expressed agreement with Judge Levin's discrediting of employer's experts' opinions, but, "based on the Board's findings and its interpretation of *Scarbro*" (*Eastern Associated Coal Corp. v. Director, OWCP [Scarbro]*, 220 F.3d 250, 22 BLR 2-93 (4th Cir. 2000)), he held that employer had proven that the opacities in claimant's lungs are not coal dust related. Decision and Order on Remand at 7. In other words, Chief Judge Vittone made plain that the findings underlying his decision are not his but those of the Board, set forth in its prior decisions in this case. Because Chief Judge Vittone's opinion was constructed entirely of Board findings, without any recognition of the administrative law judge's discretion in weighing the evidence, his decision denying benefits should be vacated and Judge Levin's initial decision awarding benefits should be re-instated.

Moreover, I believe that the majority has misread claimant's brief on appeal when it asserts that claimant did not challenge Chief Judge Vittone's statements that the "persuasive x-ray evidence" was "evenly balanced", and that employer's experts' opinions were supported by a preponderance of the x-ray evidence. A fair reading of claimant's brief reveals that he contends the administrative law judge erred in crediting employer's opinions attributing the large opacity shown on x-ray to old granulomatous disease, tuberculosis or cancer, because they are speculative, inconsistent and unsupported by the record. On the other hand, the finding of complicated pneumoconiosis arising out of coal mine employment is well-supported in the record, given claimant's history of forty-one and a half years of coal mine employment. That is the essence of this case.

In sum, Chief Judge Vittone made abundantly clear that he was constrained by the Board's prior opinions to issue the Decision and Order on Remand denying benefits, currently on review. He also points out that I had anticipated this outcome in my dissent. Decision and Order on Remand at 6. He went on to say:

> She noted further, when the Board affirms that decision, Claimant can obtain review in the Fourth Circuit where she would hope the Court would reverse the Board and remand the case with instructions to reinstate the ALJ's initial decision.

Decision and Order on Remand at 6. The court has done so in the past and, I believe, should do so in the case at bar. *See Sykes v. Director, OWCP*, 812 F.2d 890, 894, 10 BLR 2-95, 2-99 (4th Cir. 1987).

Accordingly, I agree with Chief Judge Vittone that Judge Levin properly exercised his discretion in holding that claimant is entitled to an award of benefits, and I dissent from the majority's decision to affirm Chief Judge Vittone's Decision and Order on Remand denying benefits.

_____

REGINA C. McGRANERY
Administrative Appeals Judge