BRB No. 11-0665 BLA

JAMES D. NICHOLS	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	DATE ISSUED: 06/20/2012
	)	
RADERS RUN MINING, INCORPORATED	)	
	)	
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 Richard A. Morgan, Administrative Law Judge, United States Department of Labor.

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

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

PER CURIAM:

Claimant appeals the Decision and Order Denying Benefits (09-BLA-5701) of Administrative Law Judge Richard A. Morgan rendered on a 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). This case involves claimant's request for modification of the denial of a claim he filed on June 14, 2004.[1] Director's Exhibit 2.

[1] Because claimant filed his claim before January 1, 2005, a recent amendment to the Act does not affect this case. *See* Pub. L. No. 111-148, §1556(a),(c), 124 Stat. 119 (2010) (to be codified at 30 U.S.C. §921(c)(4)). *See* Decision and Order at 18 n.22.

In the initial decision, Administrative Law Judge Paul H. Teitler credited claimant with at least sixteen years of coal mine employment and found that the weight of the evidence was sufficient to establish simple pneumoconiosis, arising out of coal mine employment, at 20 C.F.R. §§718.202(a), 718.203(b), but insufficient to establish complicated pneumoconiosis, or total disability due to pneumoconiosis, pursuant to 20 C.F.R. §§718.304, 718.204(b), (c). Director's Exhibit 52. Accordingly, Judge Teitler denied benefits. Pursuant to claimant's appeal, the Board affirmed Judge Teitler's denial of benefits. *J.N.* [*Nichols*] *v. Raiders Run Mining, Inc.*, BRB No. 07-0489 BLA (Feb. 28, 2008)(unpub.).

Claimant filed a request for modification on August 27, 2008. Director's Exhibit 61. In a decision dated May 25, 2011, Administrative Law Judge Richard A. Morgan (the administrative law judge) found that claimant established the existence of simple pneumoconiosis, arising out of coal mine employment, through x-ray and medical opinion evidence at 20 C.F.R. §§718.202(a)(1), (4), 718.203(b), but failed to establish the existence of complicated pneumoconiosis, or total disability due to pneumoconiosis, pursuant to 20 C.F.R. §§718.304, 718.204(b), (c). Consequently, the administrative law judge found that claimant did not establish a change in conditions, or a mistake in a determination of fact, pursuant to 20 C.F.R. §725.310. Accordingly, the administrative law judge denied modification, and denied benefits.

On appeal, claimant contends that the administrative law judge erred in his evaluation of the computed tomography (CT) scan evidence in finding that claimant did not establish the existence of complicated pneumoconiosis pursuant to 20 C.F.R. §§718.204(b)(1), 718.304. Neither employer, nor the Director, Office of Workers' Compensation Programs, has filed a response brief. [2]

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.[3] 33 U.S.C. §921(b)(3), as incorporated by 30

[2] The administrative law judge's findings that claimant did not establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(i)-(iv), that the x-ray evidence is negative for complicated pneumoconiosis, pursuant to 20 C.F.R. §718.304(a), and that there is no biopsy or autopsy evidence of complicated pneumoconiosis, pursuant to 20 C.F.R. §718.304(b), are unchallenged on appeal. Therefore, these findings are affirmed. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

[3] 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).

U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman and Grylls Associates, Inc.*, 380 U.S. 359 (1965).

In order to establish entitlement to benefits under 20 C.F.R. Part 718 in a miner's claim, a claimant must establish the existence of pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, and that the pneumoconiosis is totally disabling. 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure to establish any one of these elements precludes entitlement. *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(*en banc*).

An administrative law judge may grant modification based on a change in conditions or because of a mistake in a determination of fact. 20 C.F.R. §725.310(a). When a request for modification is filed, "any mistake of fact may be corrected [by the administrative law judge], including the ultimate issue of benefits eligibility." *Betty B. Coal Co. v. Director, OWCP* [*Stanley*], 194 F.3d 491, 497, 22 BLR 2-1, 2-11 (4th Cir. 1999); *Jessee v. Director, OWCP*, 5 F.3d 723, 18 BLR 2-26 (4th Cir. 1993).

Claimant argues that the administrative law judge erred in finding that the CT scan evidence did not establish the existence of complicated pneumoconiosis, and therefore, erred in finding that claimant was not entitled to invocation of the irrebuttable presumption of total disability due to pneumoconiosis, set out at 20 C.F.R. §718.304. Section 411(c)(3) of the Act, implemented by Section 718.304, provides that there is an irrebuttable presumption that a miner is totally disabled due to pneumoconiosis if the miner suffers from a chronic dust disease of the lung which, (A) when diagnosed by x-ray, yields one or more large opacities (greater than one centimeter in diameter) that would be classified in Category A, B, or C under the ILO classification system; (B) when diagnosed by biopsy or autopsy, yields massive lesions in the lung;[4] or (C) when diagnosed by other means, is a condition that would yield results equivalent to (A) or (B). 30 U.S.C. §921(c)(3); 20 C.F.R. §718.304(a)-(c).

The introduction of legally sufficient evidence of complicated pneumoconiosis does not automatically qualify a claimant for the irrebuttable presumption. The administrative law judge must first determine whether the evidence in each category tends to establish the existence of complicated pneumoconiosis, and then must weigh together the evidence at subsections (a), (b), and (c) before determining whether invocation of the irrebuttable presumption pursuant to Section 718.304 has been established. *Lester v. Director, OWCP*, 993 F.2d 1143, 1145-46, 17 BLR 2-114, 2-117-

[4] In this case, there was no biopsy or autopsy evidence in the record for consideration pursuant to 20 C.F.R. §718.304(b).

18 (4th Cir. 1993); *Melnick v. Consolidation Coal Co.*, 16 BLR 1-31, 1-33-34 (1991)(en banc).

Claimant specifically asserts that the administrative law judge erred in according greater weight to the negative CT scan interpretations by Drs. Wheeler and Scatarige, than to the positive interpretation by Dr. Raskin, pursuant to 20 C.F.R. §718.304(c). We disagree. The record contains three interpretations of a CT scan dated May 22, 2008. Dr. Raskin, a Board-certified radiologist, interpreted the CT scan as showing progressive massive fibrosis in the right upper zone, and fine nodular interstitial lung disease and confluent densities compatible with complicated coal workers' pneumoconiosis. Director's Exhibits 61, 66. Drs. Wheeler and Scatarige, both Board-certified radiologists and B readers, interpreted the CT scan as negative for any form of pneumoconiosis.[5] Employer's Exhibits 1, 2.

The administrative law judge permissibly accorded greater weight to the negative interpretations of Drs. Scatarige and Wheeler, in part, because their qualifications are superior to Dr. Raskin's. *See Adkins v. Director, OWCP*, 958 F.2d 49, 16 BLR 2-61 (4th Cir. 1992); *Sheckler v. Clinchfield Coal Co.*, 7 BLR 1-128 (1984); Decision and Order at 17. Contrary to claimant's argument, the administrative law judge was not required to discount the opinions of Drs. Wheeler and Scatarige, that the CT scan did not reveal complicated pneumoconiosis, on the ground that they did not diagnose simple pneumoconiosis, which the administrative law judge found established through the x-ray and medical opinion evidence. *See Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 533, 21 BLR 2-323, 2-336 (4th Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 441, 21 BLR 2-269, 2-274 (4th Cir. 1997); Claimant's Brief at 5-6. We, therefore, affirm the administrative law judge's finding that the CT scan evidence did not establish the existence of complicated pneumoconiosis pursuant to 20 C.F.R. §718.304(c).[6]

[5] Dr. Wheeler identified a 3.2 centimeter mass in the right upper lobe, compatible with granulomatous disease, histoplasmosis, or mycobacterium avium complex. Employer's Exhibit 2. Dr. Wheeler ruled out coal workers' pneumoconiosis based on the absence of symmetrical small nodular infiltrates in the central mid and upper lungs. Employer's Exhibit 2. Dr. Scatarige identified a 2.5 centimeter by 3.0 centimeter mass, or mass-like infiltrate, in the right upper lobe, that was most likely tuberculosis, histoplasmosis, another fungal infection, or atypical mycobacterium. Dr. Scatarige explained that the absence of background, symmetrical small opacities made the diagnoses of coal workers' pneumoconiosis and silicosis unlikely. Employer's Exhibit 1.

[6] Claimant further asserts that the administrative law judge erred in discounting Dr. Raskin's opinion because he did not provide the equivalency determination required by the United States Court of Appeals for the Fourth Circuit. *See Eastern Associated Coal Corp. v. Director, OWCP* [*Scarbro*], 220 F.3d 250, 255-56, 22 BLR 2-93, 2-100

Consequently, we affirm the administrative law judge's finding that claimant is not entitled to invocation of the irrebuttable presumption set forth at 20 C.F.R. §718.304.

Because claimant did not establish entitlement to the irrebuttable presumption of total disability due to pneumoconiosis at 20 C.F.R. §§718.204(b)(1), 718.304, or establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(i)-(iv), we affirm the administrative law judge's findings that claimant did not establish a mistake in a determination of fact or a change in conditions pursuant to 20 C.F.R. §725.310. Thus, the administrative law judge's denial of claimant's request for modification, and the denial of benefits, are affirmed.

(4th Cir. 2000) (holding that to constitute evidence of complicated pneumoconiosis, a condition that is diagnosed under prong (C), such as by CT scan, must show as a greater-than-one-centimeter opacity if it were seen on a chest x-ray); *Double B Mining, Inc. v. Blankenship*, 177 F.3d 240, 243, 22 BLR 2-554, 2-560-61 (4th Cir. 1999); Claimant's Brief at 4-5. Because the administrative law judge provided a valid, alternative basis for discounting the opinion of Dr. Raskin, we need not address claimant's additional contention. *See Kozele v. Rochester & Pittsburgh Coal Co.*, 6 BLR 1-378 (1983).

Accordingly, the administrative law judge's Decision and Order Denying Benefits is affirmed.

SO ORDERED.

_____
NANCY S. DOLDER, Chief
Administrative Appeals Judge

_____
ROY P. SMITH
Administrative Appeals Judge

_____
BETTY JEAN HALL
Administrative Appeals Judge