U.S. Department of Labor

Benefits Review Board
P.O. Box 37601
Washington, DC 20013-7601

BRB Nos. 15-0339 BLA
and 15-0339 BLA-A

JAMES JUNIOR TILLEY	)	
	)	
Claimant-Petitioner	)	
Cross-Respondent	)	
	)	
v.	)	
	)	
MAPLE MEADOW MINING COMPANY	)	DATE ISSUED: 06/14/2016
	)	
and	)	
	)	
RAG AMERICAN COAL COMPANY	)	
	)	
Employer/Carrier-	)	
Respondents	)	
Cross-Petitioners	)	
	)	
DIRECTOR, OFFICE OF WORKERS'	)	
COMPENSATION PROGRAMS, UNITED	)	
STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal and Cross-Appeal of the Decision and Order Denying Benefits Upon Request for Modification of Theresa C. Timlin, Administrative Law Judge, United States Department of Labor.

S.F. Raymond Smith, Charleston, West Virginia, for claimant.

Ann B. Rembrandt (Jackson Kelly, PLLC), Charleston, West Virginia, for employer/carrier.

Before: HALL, Chief Administrative Appeals Judge, BOGGS and BUZZARD, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals, and employer cross-appeals, the Decision and Order Denying Benefits Upon Request for Modification (2012-BLA-05536) of Administrative Law Judge Theresa C. Timlin, rendered on a request for modification filed pursuant to the provisions of the Black Lung Benefits Act, as amended,[1] 30 U.S.C. §§901-944 (the Act) (2012). This is the third time that this case has been before the Board.[2] In the Board's most recent Decision and Order, the Board affirmed Administrative Law Judge Janice K. Bullard's denial of claimant's request for modification of a denied subsequent claim, holding that she properly determined that claimant failed to establish either a mistake in a determination of fact in the prior denial, or a change in conditions pursuant to 20 C.F.R. §725.310, and failed to invoke the irrebuttable presumption of total disability due to pneumoconiosis set forth in Section 411(c)(3) of the Act, 30 U.S.C. §921(c)(3) (2012), as implemented by 20 C.F.R. §718.304. *Tilley v. Maple Meadow Mining Co.*, BRB No. 10-0423 BLA (Mar. 16, 2011) (unpub.).

Claimant filed a second request for modification on May 13, 2011. The district director denied the request, and claimant asked for a formal hearing. The case was assigned to Judge Timlin (the administrative law judge), who granted the parties' Joint Motion for Decision on the Record, and Motion to Cancel Hearing.[3] In a Decision and

[1] The most recent amendments to the Black Lung Benefits Act, which became effective on March 23, 2010, do not apply in this case, as the claim at issue was filed prior to January 1, 2005. 30 U.S.C. §921(c)(4), as implemented by 20 C.F.R. §718.305(a).

[2] Relevant to the present appeal, claimant filed his second subsequent claim on April 22, 2003, which was denied by Administrative Law Judge Richard Stansell-Gamm because claimant failed to establish total disability. Director's Exhibits 4, 58. Claimant filed his first appeal with the Board, which affirmed the denial of benefits on May 20, 2008. *Tilley v. Maple Meadow Mining Co.*, BRB No. 07-0713 BLA (May 20, 2008) (unpub.); Director's Exhibit 74. Claimant filed a request for modification on August 20, 2008, which was denied by Administrative Law Judge Janice K. Bullard, for failure to establish total disability. Director's Exhibits 76, 99.

[3] The administrative law judge also issued an Order asking the parties to show cause as to why she should not take official notice of reports calling into question the credibility of Dr. Wheeler's x-ray readings, and the readings performed by other

Order issued on May 27, 2015, which is the subject of this appeal, the administrative law judge credited claimant with 30.25 years of underground coal mine employment, and considered whether he established a prerequisite for modification under 20 C.F.R. §725.310. Based on a review of all of the evidence of record, the administrative law judge concluded that claimant failed to establish a mistake in a determination of fact in the decisions denying claimant's 2003 subsequent claim and 2008 request for modification. The administrative law judge further found that claimant could not establish a change in conditions apart from possible invocation of the irrebuttable presumption of total disability under 30 U.S.C. §921(c)(3), as implemented by 20 C.F.R. §718.304, as he did not submit any new evidence pertaining to the establishment of total disability under 20 C.F.R. §718.204(b)(2)(i)-(iv). The administrative law judge also determined that claimant did not establish that he has complicated pneumoconiosis pursuant to 20 C.F.R. §718.304 and, therefore, did not establish a change in conditions by invoking the irrebuttable presumption of total disability due to pneumoconiosis. Accordingly, the administrative law judge denied benefits.

On appeal, claimant contends that the administrative law judge did not properly weigh the x-ray evidence in finding that claimant did not establish the existence of complicated pneumoconiosis under 20 C.F.R. §718.304(a). In a consolidated response and cross-appeal, employer urges the Board to affirm the denial of claimant's modification request, and argues that the administrative law judge erred in discrediting Dr. Hippensteel's opinion, that claimant does not have complicated pneumoconiosis. The Director, Office of Workers' Compensation Programs, has submitted a letter indicating that he will not file a substantive response, unless specifically requested to do so by the Board.[4]

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physicians associated with the Department of Radiology at Johns Hopkins University. Claimant did not respond. Employer objected to the administrative law judge's proposed action and requested that it be dismissed as a party to the claim. In her Decision and Order, the administrative law judge stated, "[i]n light of [e]mployer's unopposed objections, I neither take official notice of, nor in any way consider" the reports addressing "the veracity of Dr. Wheeler's medical opinions and all medical opinions stemming from the Johns Hopkins Department of Radiology." Decision and Order at 3-4.

[4] We affirm, as unchallenged on appeal, the administrative law judge's findings that claimant did not establish a mistake in a determination of fact in the prior denials of his subsequent claims, or a change in conditions as to the prior determinations that he failed to prove total disability under 20 C.F.R. §718.204(b)(2)(i)-(iv). *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 9.

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.[5] 33 U.S.C. §921(b)(3), as incorporated into the Act by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman and Grylls Associates, Inc*., 380 U.S. 359 (1965).

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(c); *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(c)(3). In this case, claimant's 2000 claim was denied because he failed to establish that he is totally disabled. Director's Exhibit 2. Claimant, therefore, had to submit new evidence establishing a change in this element of entitlement in order to have his 2003 claim reviewed on the merits. 20 C.F.R. §725.309(c). Additionally, because claimant seeks modification of the denial of his 2003 subsequent claim, the issue before the administrative law judge was whether the medical evidence developed since the denial of benefits in the prior claim (*i.e.*, the evidence developed since Judge Stansell-Gamm's May 3, 2007 denial of benefits) was sufficient to establish a change in an applicable condition of entitlement at 20 C.F.R. §725.309, thereby establishing a basis for modification at 20 C.F.R. §725.310. *See Hess v. Director, OWCP*, 21 BLR 1-141 (1998).

The administrative law judge was also required to determine whether there was a mistake in a determination of fact in the denial of claimant's subsequent claim. The administrative law judge has broad discretion to correct mistakes of fact, including the ultimate fact of entitlement. *See Jessee v. Director, OWCP*, 5 F.3d 723, 725, 18 BLR 2-26, 2-28 (4th Cir. 1993). The modification of a claim does not automatically flow from a finding that a mistake was made in an earlier determination, however, and should be made only when doing so will render justice under the Act. *See Banks v. Chi. Grain Trimmers Ass'n*, 390 U.S. 459, 464 (1968) (holding that the purpose of modification is to "render justice"); *Westmoreland Coal Co. v. Sharpe* (*Sharpe II*), 692 F. 3d 317, 327-28, 25 BLR 2-157, 2-173-174 (4th Cir. 2012), *cert. denied,* 133 S.Ct. 2852 (2013); *Sharpe v. Director, OWCP* (*Sharpe I*), 495 F.3d 125, 128, 24 BLR 2-56, 2-66 (4th Cir. 2007).

[5] This case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit because claimant's coal mine employment was in West Virginia. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Director's Exhibit 5.

Because the administrative law judge found that claimant did not establish a mistake in a determination of fact, or a change in conditions on the issue of total disability at 20 C.F.R. §718.204(b)(2), she next considered whether claimant could invoke the irrebuttable presumption of total disability due to pneumoconiosis, thereby establishing both a change in an applicable condition of entitlement at 20 C.F.R. §725.309, and a change in conditions at 20 C.F.R. §725.310. Under 20 C.F.R. §718.304, the irrebuttable presumption is invoked if the miner suffers from a chronic dust disease of the lung which: (a) when diagnosed by x-ray, yields one or more opacities greater than one centimeter in diameter that would be 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, would be a condition that could reasonably be expected to yield a result equivalent to (a) or (b). *See* 20 C.F.R. §718.304. The United States Court of Appeals for the Fourth Circuit has held, "'[b]ecause prong (A) sets out an entirely objective scientific standard' - i.e., an opacity on an x-ray greater than one centimeter - x-ray evidence provides the benchmark for determining what, under prong (B), is a 'massive lesion' and what, under prong (C), is an equivalent diagnostic result reached by other means." *Scarbro v. E. Assoc. Coal Corp.*, 220 F.3d 250, 256, 22 BLR 2-93, 2-101 (4th Cir. 2000), *quoting Double B Mining, Inc. v. Blankenship*, 177 F.3d 240, 243, 22 BLR 2-554, 2-560-61 (4th Cir. 1999). The court has also held that a diagnosis of massive lesions, standing alone, can satisfy the "statutory ground" for invocation of the irrebuttable presumption at 20 C.F.R. §718.304(b). *Perry v. Mynu Coals, Inc.*, 469 F.3d 360, 365, 23 BLR 2-374, 2-384 (4th Cir. 2006).

The introduction of legally sufficient evidence of complicated pneumoconiosis does not, however, automatically invoke the irrebuttable presumption 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 that pneumoconiosis is not present, resolve any conflicts, and make a finding of fact. *See Lester v. Director, OWCP*, 993 F.2d 1143, 1145-46, 17 BLR 2-1143, 2-1145-46 (4th Cir. 1993); *Gollie v. Elkay Mining Corp*., 22 BLR 1-306, 1-311 (2003); *Melnick v. Consolidation Coal Co.*, 16 BLR 1-31, 1-33-34 (1991) (en banc).

Pursuant to 20 C.F.R. §718.304(a), the administrative law judge initially considered the newly submitted x-ray evidence, comprised of three readings of a film dated April 19, 2011.[6] Decision and Order at 11; Claimant's Exhibit 1; Employer's

[6] All of the x-ray interpretations submitted with the 2008 and 2011 requests for modification were performed by physicians who were dually qualified as Board-certified radiologists and B readers. Director's Exhibits 75, 79; Claimant's Exhibit 1; Employer's Exhibits 1, 2.

Exhibits 1, 2. The administrative law judge credited Dr. Ahmed's positive reading of the April 19, 2011 x-ray for simple pneumoconiosis, but found that his "opinion on complicated pneumoconiosis is too equivocal to support a finding of complicated pneumoconiosis." Decision and Order at 15. In support of her finding, the administrative law judge cited Dr. Ahmed's checking of the "0" box in response to the question of whether the x-ray contains large opacities, and his statement that the 2 centimeter mass that he observed in the miner's right upper lobe "could either be a neoplasm or complicated pneumoconiosis." *Id*.; Claimant's Exhibit 1. Regarding the negative readings of the April 19, 2011 film submitted by Drs. Wheeler and Scott, the administrative law judge determined that they had "little probative value" because they are inconsistent with earlier findings of simple pneumoconiosis, speculative as to the etiology of the 3 centimeter mass that they detected in the miner's right upper lobe, and conclusory. Decision and Order at 15. Based on these findings, the administrative law judge concluded that the newly submitted x-ray evidence was insufficient to establish the existence of complicated pneumoconiosis. *Id.*

The administrative law judge then considered the x-ray evidence proffered in conjunction with claimant's 2008 request for modification, which consists of three readings of an x-ray dated July 21, 2008. Decision and Order at 16-17; Director's Exhibits 75, 79. The administrative law judge found that Dr. Ahmed's diagnosis of a Category A large opacity was equivocal, based on his accompanying statement that "masses in the upper lung fields are very likely part of complicated pneumoconiosis but malignancy cannot be excluded; follow-up chest CT would be useful."[7] Decision and Order at 17; Director's Exhibit 75. The administrative law judge gave little weight to the Category 0 readings by Drs. Scatarige and Scott because they were equivocal as to the source of the apical masses, which Dr. Scatarige measured as 3 centimeters in diameter, and their negative readings for simple pneumoconiosis were "contrary to prior determinations." Decision and Order at 17; Director's Exhibit 79.

Upon weighing the x-ray evidence submitted with claimant's 2008 and 2011 requests for modification together, the administrative law judge determined that the readings by Drs. Wheeler, Scott, and Scatarige have little probative value because they failed to diagnose simple pneumoconiosis and speculated that diseases other than complicated pneumoconiosis caused the masses that they observed in claimant's lungs. Decision and Order at 17. With respect to Dr. Ahmed's interpretations, the administrative law judge concluded:

[7] The record does not contain any CT scan evidence.

> Though Dr. Ahmed considered [c]laimant's lengthy coal mine employment history and diagnosed him with simple pneumoconiosis, his 2008 and 2011 [x]-ray interpretations were too equivocal to support a finding that [c]laimant has complicated pneumoconiosis. I further note that while he marked category "A" for the presence of large opacities in his 2008 interpretation, he marked category "0" for the presence of large opacities in his 2011 interpretation, with no explanation for the change in classification. Consequently, I find that [c]laimant has not carried his burden of demonstrating the presence of complicated pneumoconiosis by a preponderance of the evidence when the newly submitted evidence is considered in conjunction with the evidence from the prior denial.

Id. at 18.

Claimant alleges that the administrative law judge erred by failing to make an independent finding as to whether the x-ray evidence submitted in conjunction with his 2008 and 2011 requests for modification satisfied the criteria in 20 C.F.R. §718.304(a). Claimant maintains that, because the x-ray readers detected the presence of opacities greater than one centimeter in diameter, the administrative law judge should have found that the irrebuttable presumption of total disability due to pneumoconiosis was invoked, regardless of whether the readers diagnosed "complicated pneumoconiosis." Claimant's Brief at 8. Claimant also contends that the administrative law judge erred in finding that Dr. Ahmed's interpretations of the 2008 and 2011 x-rays are equivocal.

Although claimant is correct in asserting that an administrative law judge is not bound by a medical definition of complicated pneumoconiosis when considering whether the irrebuttable presumption has been invoked, he or she is required to determine whether the evidence presented satisfies the regulatory criteria at 20 C.F.R. §718.304. *See Scarbro*, 220 F.3d at 257, 22 BLR at 2-103; *Blankenship*, 177 F.3d at 244, 22 BLR at 2-562 ("The statute does not mandate use of the medical definition of complicated pneumoconiosis."). The central issue before the administrative law judge in this case was whether the x-ray findings are in accordance with 20 C.F.R. §718.304(a),[8] which provides that the irrebuttable presumption is invoked "if the miner is suffering from a chronic dust disease of the lung which . . . when diagnosed by x-ray yields one or more

[8] The record contains no biopsy evidence relevant to 20 C.F.R. §718.304(b). At 20 C.F.R. §718.304(c), the administrative law judge considered Dr. Hippensteel's medical opinion, that claimant does not have complicated pneumoconiosis, and gave it little weight because Dr. Hippensteel relied on the speculative x-ray readings made by Drs. Wheeler, Scott, and Scatarige. Decision and Order at 20.

opacities greater than one centimeter in diameter that would be classified as Category A, B, or C[.]" We hold that the administrative law judge acted within her discretion as fact-finder in determining that the x-ray diagnoses rendered by Drs. Ahmed, Wheeler, Scott, and Scatarige, based on their readings of the 2008 and 2011 films, do not satisfy the criteria at 20 C.F.R. §718.304(a). *See Perry*, 469 F.3d at 364, 23 BLR at 2-384; *Scarbro*, 220 F.3d at 257, 22 BLR at 2-103.

The administrative law judge rationally determined that Dr. Ahmed's x-ray interpretations do not provide the necessary documentation for a finding of complicated pneumoconiosis, because his readings are "too equivocal." Decision and Order at 18; *see Piney Mountain Coal Co. v. Mays*, 176 F.3d 753, 764, 21 BLR 2-587, 2-606 (4th Cir. 1999). The administrative law judge's categorization of Dr. Ahmed's interpretations as equivocal is supported by her correct observation that Dr. Ahmed did not explain the change in classification from Category A on the 2008 x-ray, to Category 0 on the 2011 x-ray. *See Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 532, 21 BLR 2-323, 2-334 (4th. Cir. 1998); Decision and Order at 18. Her specific finding that Dr. Ahmed's reading of the 2011 film is equivocal is supported by Dr. Ahmed's marking of the Category 0 box on the ILO form, and his comment that the 2 centimeter opacity "could either be a neoplasm or complicated pneumoconiosis." Claimant's Exhibit 1; *see Mays*, 176 F.3d at 764, 21 BLR at 2-606; Decision and Order at 15. With respect to the 2008 film, the administrative law judge permissibly found that Dr. Ahmed's interpretation lacked certainty, based on his statement that the 2 centimeter opacity he detected "is very likely" complicated pneumoconiosis and "his ultimate diagnosis that a malignancy cannot be excluded, for which he suggested further evaluation." Decision and Order at 17, *quoting* Director's Exhibit 75; *see Justice v. Island Creek Coal Co.*, 11 BLR 1-91, 1-94 (1988); *Campbell v. Director, OWCP*, 11 BLR 1-16, 1-19 (1987).

Further, contrary to claimant's assertion, the administrative law judge could not herself find that the 3 centimeter masses that Drs. Wheeler, Scott, and Scatarige observed in the apices of the claimant's lungs were lesions of complicated pneumoconiosis, without credible medical evidence establishing that they represented a dust disease of the lung and "would be classified as Category A, B or C" large opacities, or their equivalent. 20 C.F.R. §718.304(a); *see Scarbro*, 220 F.3d at 257, 22 BLR at 2-103; *Blankenship*, 177 F.3d at 243, 22 BLR at 2-560-61. Based on their ILO classification forms, in which the physicians did not check the boxes identifying any Category A, B or C large opacities, and their statements that the masses they identified did not represent pneumoconiosis, the administrative law judge properly determined that the x-ray interpretations by Drs. Wheeler, Scott, and Scatarige do not support a finding of complicated pneumoconiosis at 20 C.F.R. §718.304(a). *See Perry*, 469 F.3d at 364, 23 BLR at 2-384; *Scarbro*, 220 F.3d at 257, 22 BLR at 2-103.

In light of the administrative law judge's permissible weighing of the readings submitted by Drs. Ahmed, Wheeler, Scott, and Scatarige, we affirm the administrative law judge's finding that the x-ray evidence in this case does not satisfy the criteria at 20 C.F.R. §718.304(a). *See Perry*, 469 F.3d at 364, 23 BLR at 2-384; *Scarbro*, 220 F.3d at 257, 22 BLR at 2-103. Because the record does not contain, nor does claimant identify, any other evidence supporting a finding of complicated pneumoconiosis, we further affirm the administrative law judge's findings that claimant did not invoke the irrebuttable presumption of total disability due to pneumoconiosis at 20 C.F.R. §718.304 and, therefore, did not establish a change in an applicable condition of entitlement at 20 C.F.R. §725.309(c), or a change in conditions at 20 C.F.R. §725.310.[9] *See Lester*, 993 F.2d at 1145-46, 17 BLR at 2-1145-46; *Gollie*, 22 BLR at 1-306; *Betty B Coal Co. v. Director, OWCP* [*Stanley*], 194 F.3d 491, 497, 22 BLR 2-1, 2-11 (4th Cir. 1999).

[9] In view of our affirmance of the administrative law judge's finding that claimant failed to demonstrate a basis for modification under 20 C.F.R. §725.310, and the denial of benefits, we need not reach employer's cross-appeal challenging the administrative law judge's discrediting of Dr. Hippensteel's opinion that claimant does not have complicated pneumoconiosis. *See Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984).

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

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge

GREG J. BUZZARD
Administrative Appeals Judge