BRB No. 03-0441 BLA

CLARENCE O. CARROLL	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
WESTMORELAND COAL COMPANY	)	
	)	DATE ISSUED: 03/31/2004
Employer-Respondent	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of Decision and Order of Daniel L. Leland, Administrative Law Judge, United States Department of Labor.

S.F. Raymond Smith (Rundle and Rundle, L.C.), Pineville, West 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 HALL, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order (02-BLA-0331) of Administrative Law Judge Daniel L. Leland denying benefits 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] This case has an extended procedural history, which was

[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

previously set out in the Board's Decision and Order issued on September 18, 1998. *Carroll v. Westmoreland Coal Co.*, BRB No. 97-1812 BLA (Sept. 18, 1998)(unpub.). In that Decision and Order, the Board affirmed Administrative Law Judge Edith Barnett's findings that the newly submitted evidence was insufficient to establish that claimant suffered from complicated pneumoconiosis or a totally disabling respiratory or pulmonary impairment. The Board, therefore, affirmed Judge Barnett's finding that claimant failed to establish a material change in conditions and the denial of benefits. *Id.* Claimant's motion for reconsideration was summarily denied by the Board. *Carroll v. Westmoreland Coal Co.*, BRB No. 97-1812 BLA (Jan. 5, 1999)(Order on Motion for Recon.)(unpub.).

Claimant subsequently requested modification. By Decision and Order dated June 4, 2001, Administrative Law Judge Jeffrey Tureck found that the newly submitted evidence did not establish that claimant suffered from complicated pneumoconiosis, or that he was totally disabled from a respiratory or pulmonary impairment. Finding that claimant failed to establish a change in conditions or a mistake in a determination of fact pursuant to 20 C.F.R. §725.310 (2000), Judge Tureck denied benefits. After filing a Notice of Appeal with the Board, claimant subsequently filed a request to withdraw his appeal, which the Board granted on August 17, 2001. *Carroll v. Westmoreland Coal Co.*, BRB No. 01-0734 BLA (Aug. 17, 2001)(Order)(unpub.).

Claimant subsequently filed a second request for modification. Administrative Law Judge Daniel L. Leland (the administrative law judge) initially found that the newly submitted evidence was insufficient to establish the existence of complicated pneumoconiosis, thereby precluding claimant from establishing entitlement based on the irrebuttable presumption at 20 C.F.R. §718.304. In addition, the administrative law judge found the evidence insufficient to establish total respiratory or pulmonary disability pursuant to 20 C.F.R. §718.204(b).[2] Finding the evidence insufficient to establish either a change in conditions or a mistake in a determination of fact pursuant o 20 C.F.R. §725.310 (2000), the administrative law judge denied benefits.

(2002). All citations to the regulations, unless otherwise noted, refer to the amended regulations.

[2] The provision pertaining to total disability, previously set out at 20 C.F.R. §718.204(c), is now found at 20 C.F.R. §718.204(b), while the provision pertaining to disability causation, previously set out at 20 C.F.R. §718.204(b), is now found at 20 C.F.R. ' 718.204(c).

On appeal, claimant asserts that the administrative law judge erred in finding that he is not entitled to the irrebuttable presumption at 20 C.F.R. §718.304. Claimant also contends that the administrative law judge erred in finding the pulmonary function study and medical opinion evidence insufficient to establish total disability. Employer responds, urging affirmance of the denial of benefits. The Director, Office of Workers' Compensation Programs, has not submitted a brief in this appeal.

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).

The Board has held that in considering whether a claimant has established a change in conditions pursuant to 20 C.F.R. §725.310 (2000),[3] an administrative law judge is obligated to perform an independent assessment of the newly submitted evidence, considered in conjunction with the previously submitted evidence, to determine if the weight of the new evidence is sufficient to establish at least one element of entitlement which defeated entitlement in the prior decision. *Nataloni v. Director, OWCP*, 17 BLR 1-82 (1993); *Kovac v. BCNR Mining Corp.*, 14 BLR 1-156 (1990), *modified on recon.*, 16 BLR 1-71 (1992). In the prior decision, Judge Tureck found that the newly submitted evidence was insufficient to establish the existence of a totally disabling respiratory or pulmonary impairment. Judge Tureck, therefore, denied claimant's request for modification under 20 C.F.R. §725.310 (2000). Consequently, the issue properly before the administrative law judge was whether the newly submitted evidence was sufficient to establish total disability pursuant to 20 C.F.R. §718.204(b).

Claimant initially challenges the administrative law judge's finding that the evidence does not establish the existence of complicated pneumoconiosis pursuant to Section 718.304. Claimant asserts that the administrative law judge erred in construing *Double B Mining, Inc. v. Blankenship*, 177 F.3d 240, 22 BLR 2-554 (4th Cir. 1999). Claimant specifically argues that the "issue before the [administrative law judge] was whether or not the large opacity which even the employer's physicians found on the claimant's x-ray films was equivalent to the standard set forth in the regulations." Claimant's Brief at 4-5 (unpaginated).

[3]Although Section 725.310 has been revised, these revisions apply only to claims filed after January 19, 2001.

Before determining whether invocation of the irrebuttable presumption at Section 411(c)(3) of the Act, 30 U.S.C. §921(c)(3), as implemented by 20 C.F.R. §718.304,[4] has been established, the administrative law judge shall first determine whether the evidence in each category under Section 718.304(a)-(c) tends to establish the existence of complicated pneumoconiosis and then all relevant evidence pursuant to Section 718.304(a)-(c) must be considered and weighed together, *see Island Creek Coal Co. v. Compton*, 211 F.3d 203, 22 BLR 2-162 (4th Cir. 2000); *Lester v. Director, OWCP*, 993 F.2d 1143, 17 BLR 2-114 (4th Cir. 1993); *Melnick v. Consolidation Coal Co.*, 16 BLR 1-31 (1991)(*en banc*). The irrebuttable presumption under Section 411(c)(3) of the Act, 30 U.S.C. §921(b)(3), does not refer to the triggering condition for invocation of the presumption as "complicated pneumoconiosis," rather the presumption is triggered by the application of congressionally defined criteria, *see Eastern Associated Coal Corp. v. Director, OWCP* [*Scarbro*], 220 F.3d 250, 22 BLR 2-93 (4th Cir. 2000); *Blankenship, supra*; *see also Braenovich v. Cannelton Industries, Inc.*, 22 BLR 1-236 (2003). Thus, the United States Court of Appeals for the Fourth Circuit, within whose jurisdiction this case arises, has held that the irrebuttable presumption at Section 411(c)(3) of the Act provides three different ways of establishing the triggering condition and thus requires that the administrative law judge make an equivalency determination to make certain that regardless of which diagnostic technique is used, the same underlying condition triggers the presumption, *i.e.*, if a diagnosis is by biopsy or autopsy, a miner must have "massive

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[4] 20 C.F.R. §718.304, which implements the irrebuttable presumption at Section 411(c)(3) of the Act, 30 U.S.C. §921(c)(3), provides, in relevant part:

There is an irrebuttable presumption that a miner is totally disabled due to pneumoconiosis, that the miner's death was due to pneumoconiosis or that a miner was totally disabled due to pneumoconiosis at the time of death, if such miner is suffering or suffered from a chronic 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 paragraphs (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.

lesions" which would, if x-rayed, show as opacities greater than one centimeter in diameter, *see Blankenship, supra*.

In finding the evidence insufficient to establish the existence of complicated pneumoconiosis, the administrative law judge addressed claimant's assertion regarding the need to make an equivalency determination. The administrative law judge stated:

> Claimant's argument that an equivalency determination must be performed on the x-ray evidence is misguided. As explained in *Blankenship*, "prong (a) sets our an entirely objective scientific standard, [and] it provides the mechanism for determining equivalencies under prong (b) or prong (c)." 177 F.3d at 243. An equivalency determination cannot be performed on the x-ray evidence because the applicable regulation already defines the classification of complicated pneumoconiosis by way of x-ray evidence in objective terms. Rather, all of the relevant x-ray evidence must be weighed to determine if the irrebuttable presumption has been invoked under §718.304(a).

Decision and Order at 7.

We reject claimant's assertion that the administrative law judge erred in evaluating the evidence regarding complicated pneumoconiosis. In order to satisfy the equivalency determination detailed in *Blankenship*, the administrative law judge must determine whether massive opacities diagnosed by autopsy or biopsy evidence, or by other means, are equivalent to the objective scientific standard mandated by Congress in Section 718.304(a), *i.e.*, one or more large opacities (greater than 1 centimeter in diameter) that would be classified in Category A, B, or C, when diagnosed by chest x-ray. 20 C.F.R. §718.304 (2000). An x-ray interpretation either satisfies the objective standards, or it does not. Because claimant has not provided any further allegation of error regarding the administrative law judge's evaluation of the evidence at Section 718.304, we affirm this finding. *Fish v. Director, OWCP*, 6 BLR 1-107 (1983).

Claimant also challenges the administrative law judge's finding that the newly submitted pulmonary function study evidence is insufficient to establish total disability. *See* 20 C.F.R. §718.204(b)(2)(i). The administrative law judge noted that the three pulmonary function studies submitted since the denial of claimant's previous claim each yielded non-qualifying values. The administrative law judge further noted that claimant did not submit any new pulmonary function study results with his current petition for modification. Inasmuch as all of the pulmonary function study evidence considered by

the administrative law judge is non-qualifying,[5] Director's Exhibits 11, 32, 62, we affirm the administrative law judge's finding that the newly submitted pulmonary function study evidence is insufficient to establish total disability.[6] *See* 20 C.F.R. §718.204(b)(2)(i).

Claimant also challenges the administrative law judge's finding that the medical opinion evidence is insufficient to establish total disability. *See* 20 C.F.R. §718.204(b)(2)(iv). Specifically, claimant asserts that the only reasoned medical opinion was authored by Dr. Greenberg and that only Dr. Greenberg considered the exertional requirements of claimant's usual coal mine employment.

The administrative law judge considered the medical opinion evidence and noted that the record contains reports from nine physicians. The administrative law judge stated:

> Dr. Greenberg was the only physician to find that Claimant is totally disabled. He stated that Claimant has a moderately severe impairment which is equally caused by coal workers' pneumoconiosis and heart disease. However, the other eight physicians, all of whom are board-certified pulmonologists, have consistently found that Claimant does not have a pulmonary or respiratory impairment attributable to pneumoconiosis or coal dust exposure, and that he is not totally and permanently disabled from a pulmonary standpoint. These physicians based their opinions on Claimant's normal pulmonary function studies and arterial blood gas tests over the years, and as recently as January of 1999, which indicated that Claimant's lung functioning is normal. In addition, their opinions are based on a review of the medical evidence in the record. There is no other evidence in the record that demonstrates that Claimant is disabled from a pulmonary or respiratory standpoint.

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[5] A "qualifying" pulmonary function study yields values which are equal to or less than the applicable table values, *i.e.* Appendix B of Part 718. A "non-qualifying" study yields values which exceed the requisite table values.

[6] We also affirm, as unchallenged on appeal, the administrative law judge's finding that the newly submitted arterial blood gas study evidence is insufficient to establish total disability. *See* 20 C.F.R. §718.204(b)(2)(ii); *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983). We similarly affirm the administrative law judge's finding that the newly submitted evidence is insufficient to establish that claimant suffers from cor pulmonale with right-sided congestive heart failure. *See* 20 C.F.R. §718.204(b)(2)(iii).

Decision and Order at 10. The administrative law judge therefore found that the medical opinion evidence did not demonstrate total respiratory or pulmonary disability.

We affirm the administrative law judge's finding that the medical opinion evidence does not establish that claimant suffers from a totally disabling respiratory or pulmonary impairment. The administrative law judge permissibly relied upon the weight of the medical reports, which state that claimant does not suffer from a respiratory or pulmonary impairment,[7] opinions which the administrative law judge found to be well-documented and well-reasoned, and provided by highly qualified physicians, over the one contrary opinion authored by Dr. Greenberg, whose qualifications are not contained in the record. *See Director, OWCP v. Greenwich Collieries* [*Ondecko*], 512 U.S. 267, 18 BLR 2A-1 (1994); *Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 21 BLR 2-323 (4th Cir. 1998); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149(1989)(*en banc*); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987). In addition, we reject claimant's assertion that the administrative law judge erred by not comparing the exertional requirements of claimant's coal mine employment with the physicians' assessments of claimant's physical limitations. This analysis is only required in situations where a physician details a claimant's physical limitations but does not provides an opinion regarding the extent of any disability the claimant suffers. *See Gee v. W.G. Moore and Sons*, 9 BLR 1-4 (1986). In the instant case, Drs. Zaldivar, Crisalli, Stewart and Fino opined that claimant does not have a respiratory impairment, Director's Exhibits 43, 95; Employer's Exhibits 6, 13, Dr. Spagnolo found no evidence of a restrictive or obstructive lung impairment, Employer's Exhibit 5, and Drs. Castle and Jarboe opined that claimant had no significant respiratory impairment, Director's Exhibit 32; Employer's Exhibit 8. Consequently, we affirm the administrative law judge's finding that the medical opinion evidence does not establish that claimant is totally disabled. *See* 20 C.F.R. §718.204(b)(2)(iv).

[7] Dr. Castle opined that claimant has no significant respiratory impairment. Director's Exhibit 32. Dr. Zaldivar opined that claimant has no evidence of any respiratory impairment. Director's Exhibit 95. Drs. Crisalli and Stewart opined that claimant does not have a respiratory or pulmonary impairment. Employer's Exhibits 6, 13. Dr. Fino opined that claimant does not have a respiratory impairment. Director's Exhibit 43. Dr. Jarboe stated that claimant has no significant pulmonary or respiratory impairment. Employer's Exhibit 8. Dr. Spagnolo opined that claimant has no evidence of a restrictive or an obstructive lung impairment. Employer's Exhibit 5. Dr. Greenberg opined that claimant has a moderately severe impairment which he believed stems from both claimant's heart disease and his lung disease. Director's Exhibit 12. Dr. Loudon opined that claimant is totally and permanently disabled and that he is unable to perform his usual coal mine employment. Dr. Loudon stated that claimant's shortness of breath is due to his cardio vascular problems rather than respiratory or pulmonary disease. Director's Exhibit 110.

We, therefore affirm the administrative law judge's finding that the evidence is insufficient to establish a change in conditions pursuant to 20 C.F.R. §725.310 (2000).[8]

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

[8] Because no party challenges the administrative law judge's finding that there was not a mistake in a determination of fact pursuant to 20 C.F.R. §725.310 (2000), this finding is affirmed. *Skrack*, *supra*.