BRB No. 10-0423 BLA

JAMES JUNIOR TILLEY	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
MAPLE MEADOW MINING COMPANY	)	
	)	DATE ISSUED: 03/16/2011
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 Janice K. Bullard, Administrative Law Judge, United States Department of Labor.

S.F. Raymond Smith (David Huffman Law Services), Parkersburg, West Virginia, for claimant.

George E. Roeder, III and Kathy L. Snyder (Jackson Kelly PLLC), Morgantown, West Virginia, for employer.

Michelle S. Gerdano (M. Patricia Smith, Solicitor of Labor; Rae Ellen James, Associate Solicitor; Michael J. Rutledge, Counsel for Administrative Litigation and Legal Advice), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

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

PER CURIAM:

Claimant appeals the Decision and Order Denying Benefits (2009-BLA-05473) of Administrative Law Judge Janice K. Bullard rendered on a claim filed pursuant to 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).[1] The procedural history of this claim is as follows. Claimant filed his current subsequent claim on April 22, 2003. In a Decision and Order issued on May 3, 2005, Administrative Law Judge Richard T. Stansell-Gamm accepted the parties' stipulation of at least ten years of coal mine employment and adjudicated the claim pursuant to the regulations at 20 C.F.R. Part 718. He found that the newly submitted evidence failed to establish total disability pursuant to 20 C.F.R. §718.204(b), that claimant was not entitled to invocation of the irrebuttable presumption of total disability due to pneumoconiosis at 20 C.F.R. §718.304 and, thus, he concluded that claimant failed to demonstrate a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309. Director's Exhibit 58. Accordingly, benefits were denied. *Id*. Claimant appealed, and the Board affirmed the denial of benefits on May 20, 2008. *J.J.T.* [*Tilley*] *v. Maple Meadow Mining Co.*, BRB No. 07-0713 BLA (May 20, 2008) (unpub.); Director's Exhibit 74.

Claimant filed a timely request for modification on August 20, 2008, which was denied by the district director on December 24, 2008. Director's Exhibits 76, 80. Claimant requested a hearing, and the case was assigned to Judge Bullard (the administrative law judge). In a Decision and Order issued on March 18, 2010, which is the subject of this appeal, the administrative law judge found that there was no mistake in a determination of fact with regard to the denial of claimant's subsequent claim by Judge Stansell-Gamm. She also determined that the evidence submitted in conjunction with the modification request failed to establish total disability, and that claimant was not entitled to invocation of the irrebuttable presumption of total disability due to pneumoconiosis pursuant to 20 C.F.R. §718.304. Thus, the administrative law judge found that claimant failed to demonstrate a change in conditions. Accordingly, because the administrative law judge found that claimant failed to demonstrate a basis for modification pursuant to 20 C.F.R. §725.310, she denied benefits.

On appeal, claimant contends that the administrative law judge erred in finding that he is not entitled to invocation of the irrebuttable presumption because she applied an incorrect standard in evaluating the x-ray evidence for complicated pneumoconiosis. Claimant also asserts that the administrative law judge did not properly explain the basis

[1] Claimant filed an initial claim for benefits on January 12, 1998, which was denied by the district director on June 11, 1998, because claimant failed to establish that he was totally disabled. Director's Exhibit 1. Claimant filed a second claim for benefits on November 15, 2000, which was also denied by the district director on February 27, 2001, because the evidence did not establish total disability and a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309. Director's Exhibit 2. Claimant took no further action with regard to that denial until he filed his current subsequent claim on April 22, 2003. Director's Exhibit 3.

for her credibility findings. Employer responds, urging affirmance of the denial of benefits. The Director, Office of Workers' Compensation Programs (the Director), has declined to file a substantive response, unless specifically requested to do so by the Board. The Director, however, asserts that the recent amendments to the Act do not apply based on the filing date of the claim.[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 into the Act by 30 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 based on his April 22, 2003 subsequent claim, claimant is required to establish that "one of the applicable conditions of entitlement . . . has changed since the date upon which the order denying the prior claim became final."[4] 20 C.F.R. §725.309(d); *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(d)(2). Claimant's prior claim was denied because he failed to establish total disability. Director's Exhibit 2. Consequently, claimant had to submit new evidence establishing this element of entitlement to obtain review of the merits of his claim. 20 C.F.R. §725.309(d)(2), (3); *White*, 23 BLR at 1-3. Additionally, because this case involves claimant's request for modification of the denial of his April 22, 2003 subsequent claim (based on a failure to establish a change in an applicable condition of entitlement), the administrative law judge was required to consider whether the new evidence submitted with the request for modification, considered in conjunction with the evidence developed in the subsequent claim, establishes a change in an applicable condition of entitlement. *See* 20 C.F.R. §725.309(d); *Hess v. Director, OWCP*, 21 BLR 1-141, 143 (1998). If the evidence establishes a change in an applicable condition of entitlement, the administrative law judge must then consider all of the record evidence as to whether claimant is entitled to benefits.[5] *Hess*, 21 BLR at 1-143.

The administrative law judge found that claimant failed to establish a change in conditions by proving that he is totally disabled. Specifically, the administrative law judge found that claimant was not able to invoke the irrebuttable presumption of total disability due to pneumoconiosis, by establishing the presence of complicated pneumoconiosis, pursuant to 20 C.F.R. §718.304, and she found that the new

[2] The recent amendments to the Black Lung Benefits Act, which became effective on March 23, 2010, do not apply in this case, as the claim was filed prior to January 1, 2005.

modification evidence, considered in conjunction with the evidence submitted with claimant's subsequent claim, failed to establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(i)-(iv). Decision and Order at 8. The administrative law judge further found that there was no mistake in a determination of fact with regard to Judge Stansell-Gamm's denial of benefits. *Id*. at 8-9.

Claimant asserts that the administrative law judge erred in finding that the evidence was insufficient to establish the existence of complicated pneumoconiosis, and that he was not entitled to invocation of the irrebuttable presumption of total disability due to pneumoconiosis.[6] Under Section 411(c)(3) of the Act, 30 U.S.C. §921(c)(3), as implemented by 20 C.F.R. §718.304 of the regulations, 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, yields massive lesions in the lung; or (c) when

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[3] 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.

[4] In order to establish entitlement to benefits in a living miner's claim pursuant to 20 C.F.R. Part 718, claimant must prove that he suffers from pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, that he is totally disabled and that his disability is due to pneumoconiosis. *See* 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure to establish any one of these elements precludes a finding of entitlement. *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986) (*en banc*).

[5] Modification may also be established based on a mistake in a determination of fact with respect to the prior denial. *See* 20 C.F.R. §725.310; *Jessee v. Director, OWCP*, 5 BLR 723, 18 BLR 2-26 (4th Cir. 1993). The administrative law judge found that there was no mistake in a determination of fact with regard to the denial of claimant's subsequent claim by Administrative Law Judge Richard T. Stansell-Gamm and we affirm that finding as it is not challenged on appeal. *See Coen v. Director, OWCP*, 7 BLR 1-30, 1-33 (1984); *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

[6] We affirm, as unchallenged by the parties on appeal, the administrative law judge's finding that claimant did not establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(i)-(iv). *See Coen*, 7 BLR at 1-33; *Skrack*, 6 BLR at 1-711.

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.

The introduction of legally sufficient evidence of complicated pneumoconiosis does not, however, automatically invoke the irrebuttable presumption found 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 of no pneumoconiosis, resolve any conflict, and make a finding of fact. *Melnick v. Consolidation Coal Co.*, 16 BLR 1-31, 1-33-34 (1991) (*en banc*); *Truitt v. North American Coal Corp.*, 2 BLR 1-199 (1979).

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.

Pursuant to 20 C.F.R. §718.304(a), the administrative law judge noted that she reviewed the previously submitted x-rays, and agreed with Judge Stansell-Gamm's finding that, while there was evidence of large opacities, the totality of evidence in the April 22, 2003 subsequent claim did not support a finding of complicated pneumoconiosis. Decision and Order at 6. In conjunction with claimant's modification request, the administrative law judge considered three readings of a July 21, 2008 x-ray. Dr. Ahmed, a Board-certified radiologist and B reader, interpreted the July 21, 2008 x-ray as positive for simple and complicated pneumoconiosis, Category A, under the system adopted by the International Labour Organization (ILO). Director's Exhibit 75. However, under section 4d of the ILO classification form, entitled "OTHER COMMENTS," Dr. Ahmed wrote, "[m]asses in the upper lung fields are very likely part of complicated pneumoconiosis[,] but malignancy cannot be excluded; follow up chest CT [scan] could be useful." *Id.* Dr. Scott, a Board certified radiologist and B reader, interpreted the July 21, 2008 x-ray as negative for simple and complicated pneumoconiosis and wrote, "[a]pical infiltrates, consider [tuberculosis], unknown activity." Director's Exhibit 79. Dr. Scatarige, a Board-certified radiologist and B reader, also interpreted the July 21, 2008 x-ray as negative for simple and complicated pneumoconiosis, and likewise noted the presence of "apical masses - possible tuberculosis." *Id.* He specified that there was no coal workers' pneumoconiosis or silicosis. *Id.*

Pursuant to 20 C.F.R. §718.304(a), the administrative law judge found that the positive reading for complicated pneumoconiosis by Dr. Ahmed was equivocal, and further determined that "while employer does not have the burden of proof," the readings

by Drs. Scott and Scatarige were also equivocal. Decision and Order at 7. Pursuant to 20 C.F.R. §718.304(c), she noted that the only other evidence pertaining to the issue of the existence of complicated pneumoconiosis was a report by Dr. Hippensteel dated May 13, 2008, along with his November 23, 2009 deposition testimony. Decision and Order at 7; Employer's Exhibits 1, 2. Based on his review of the medical record, Dr. Hippensteel opined that claimant suffers from simple pneumoconiosis, but not complicated pneumoconiosis. Decision and Order at 7. The administrative law judge considered Dr. Hippensteel's opinion to be well-documented and well-reasoned and entitled to weight. *Id*. Thus, the administrative law judge found that claimant failed to establish the existence of complicated pneumoconiosis, based on the evidence overall at 20 C.F.R. §718.304, and was not entitled to invocation of the irrebuttable presumption. *Id*. at 8.

On appeal, claimant argues that the administrative law judge erred in finding Dr. Ahmed's Category A x-ray reading to be insufficient to establish that he has complicated pneumoconiosis, as described in 20 C.F.R. §718.304(a). Citing *Piney Mountain Coal Co. v. Mays*, 176 F.3d 753, 21 BLR 2-587 (4th Cir. 1999), claimant maintains that the administrative law judge erred in finding that Dr. Ahmed provided an equivocal x-ray reading of complicated pneumoconiosis. Claimant's arguments are without merit.

Contrary to claimant's contention, the administrative law judge properly considered in this case whether the July 21, 2008 x-ray showed a large pulmonary opacity, classified as Category A, B, or C under the ILO system, as set forth at 20 C.F.R. §718.304(a). *See Scarbro*, 220 F.3d at 256, 22 BLR at 2-101. In so doing, the administrative law judge rationally reviewed comments by the radiologists regarding possible etiologies for the large opacity revealed on claimant's July 21, 2008 x-ray. The administrative law judge specifically explained why she considered Dr. Ahmed's Category A x-ray reading to be equivocal and insufficient to establish that claimant has complicated pneumoconiosis. The administrative law judge stated:

> While [Dr. Ahmed's] statement that complicated pneumoconiosis is "very likely" what he saw on the [x]-ray would itself meet a preponderance of the evidence standard (that something [is] more likely than not), it must be read in context with the rest of the sentence, recommending a CT scan because "malignancy cannot be excluded." It is not necessary to exclude all alternate diagnoses[;] however, this diagnosis equivocates by recommending further testing to rule out a mutually exclusive alternate. Even though he uses the term "very likely," Dr. Ahmed's diagnosis is that the mass he sees might be a malignancy and not complicated pneumoconiosis. That is not an unequivocal finding of pneumoconiosis, and it is not entitled to weight.

Decision and Order at 7 (internal citations omitted).

The administrative law judge permissibly found that Dr. Ahmed's x-ray reading is equivocal on the issue of whether claimant has a Category A opacity or a malignancy, and that his reading is insufficient to establish the existence of complicated pneumoconiosis pursuant to 20 C.F.R. §718.204(a).[7] *See U.S. Steel Mining Co. v. Director, OWCP* [*Jarrell*], 187 F.3d 384, 391, 21 BLR 2-639, 2-652-53 (4th Cir. 1999); *Melnick*, 16 BLR at 1-37; *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989) (*en banc*); *Justice v. Island Creek Coal Co.*, 11 BLR 1-91, 1-94 (1988). As there is no other evidence of record to support a finding of complicated pneumoconiosis, we affirm the administrative law judge's finding that claimant is not entitled to invocation of the irrebuttable presumption pursuant to 20 C.F.R. §718.304.[8] *See Melnick*, 16 BLR at 1-33-34; *Truitt*, 2 BLR at 1-200; Decision and Order at 8.

Claimant has the burden to establish entitlement to benefits and bears the risk of non-persuasion if his evidence does not establish a requisite element of entitlement. *Young v. Barnes & Tucker Co.*, 11 BLR 1-147 (1988); *Oggero v. Director, OWCP*, 7 BLR 1-860 (1985). Because claimant has not established a change in an applicable condition of entitlement by proving that he is totally disabled, we affirm the administrative law judge's finding that claimant failed to demonstrate a basis for modification pursuant to 20 C.F.R. §725.310. *See Hess*, 21 BLR at 1-143.

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[7] We reject claimant's assertion that the administrative law judge improperly relied on an unpublished decision, *Yogi Mining v. Fife*, 159 F. App'x. 441 (4th Cir. 2005), to support his finding with regard to Dr. Ahmed. Contrary to claimant's contention, although Local Rule 32.1 of the Fourth Circuit, states that "[c]itation of this Court's unpublished dispositions issued prior to January 1, 2007, in briefs and oral arguments in this Court and in the district courts within this Circuit is disfavored," the rule does not preclude an administrative law judge from considering an unpublished decision in reaching his credibility determinations. Moreover, we conclude that the administrative law judge's findings were based, not on precedent, but on the facts of the case before her.

[8] We decline to address claimant's assertion that the administrative law judge erred in crediting Dr. Hippensteel's opinion, that claimant does not have complicated pneumoconiosis, at 20 C.F.R. §718.304(c). Because claimant did not present any evidence to support a finding of complicated pneumoconiosis pursuant to 20 C.F.R. §718.304(b) or (c), any error by the administrative law judge in weighing Dr. Hippensteel's opinion is harmless. *See Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984).

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