

BRB No. 13-0417 BLA

RICHARD MATNEY)
)
 Claimant-Respondent)
)
 v.)
)
 MINCHAR COAL COMPANY) DATE ISSUED: 05/23/2014
)
 and)
)
 AMERICAN MINING INSURANCE)
 COMPANY)
)
 Employer/Carrier-)
 Petitioners)
)
 DIRECTOR, OFFICE OF WORKERS')
 COMPENSATION PROGRAMS, UNITED)
 STATES DEPARTMENT OF LABOR)
)
 Party-in-Interest) DECISION and ORDER

Appeal of the Decision and Order Awarding Benefits on Modification of Subsequent Claim of Christine L. Kirby, Administrative Law Judge, United States Department of Labor.

Joseph E. Wolfe and Ryan C. Gilligan (Wolfe Williams Rutherford & Reynolds), Norton, Virginia, for claimant.

Christopher L. Wildfire (Margolis Edelstein), Pittsburgh, Pennsylvania, for employer/carrier.

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

PER CURIAM:

Employer/carrier (employer) appeals the Decision and Order Awarding Benefits on Modification of Subsequent Claim (2011-BLA-05299) of Administrative Law Judge Christine L. Kirby rendered on a claim filed on September 29, 2008, pursuant to the

provisions of the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2012)(the Act).¹ In a Decision and Order issued on May 22, 2013, the administrative law judge credited claimant with twenty years of underground coal mine employment and adjudicated the claim under the regulations contained in 20 C.F.R. Part 718. The administrative law judge found that the weight of the evidence of record, as a whole, was sufficient to establish the existence of complicated pneumoconiosis arising out of coal mine employment at 20 C.F.R. §§718.304 and 718.203(b). She further determined, therefore, that claimant invoked the irrebuttable presumption of total disability due to pneumoconiosis pursuant to 20 C.F.R. §718.304, and established a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309. Accordingly, the administrative law judge awarded benefits.²

On appeal, employer challenges the award of benefits, arguing that the administrative law judge erred in finding that claimant invoked the irrebuttable presumption at 20 C.F.R. §718.304, and established a change in an applicable condition of entitlement at 20 C.F.R. §725.309. Claimant responds, urging affirmance of the award

¹ Claimant's first claim, filed on September 6, 2000, was finally denied by the district director on October 2, 2001, because claimant failed to establish total disability due to pneumoconiosis. Director's Exhibit 1. Claimant filed the present subsequent claim on September 29, 2008. Director's Exhibit 3. The district director denied benefits on June 3, 2009, finding that claimant failed to establish the existence of pneumoconiosis or total disability due to pneumoconiosis. Director's Exhibit 29. On March 25, 2010, claimant requested modification. Director's Exhibit 31. On October 18, 2010, the district director issued a Proposed Decision and Order Granting Request for Modification, finding that claimant established the existence of complicated pneumoconiosis and, therefore, a change in conditions. Director's Exhibit 45. Employer requested a hearing and the case was transferred to the Office of Administrative Law Judges.

² The administrative law judge did not consider the applicability of the amended Section 411(c)(4) presumption in this case. Amended Section 411(c)(4) provides a rebuttable presumption of total disability due to pneumoconiosis if a miner has a totally disabling respiratory or pulmonary impairment and establishes at least fifteen years of underground coal mine employment, or coal mine employment in conditions substantially similar to those in an underground mine. 30 U.S.C. §921(c)(4), as implemented by 78 Fed. Reg. 59,102, 59,114 (Sept. 25, 2013)(to be codified at 20 C.F.R. §718.305).

of benefits. The Director, Office of Workers' Compensation Programs, declined to file a substantive response.³

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.⁴ 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).

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). Claimant's first claim, filed on September 6, 2000, was denied for failure to establish that he was totally disabled due to pneumoconiosis. Director's Exhibit 1. Consequently, in order to obtain review of the merits of his current subsequent claim, claimant had to submit new evidence establishing this element of entitlement.

Additionally, because claimant seeks modification of the denial of his subsequent claim for failing to satisfy the requirements of 20 C.F.R. §725.309, the administrative law judge was required to determine whether the new evidence submitted on modification, considered along with the evidence originally submitted in the current subsequent claim, established a change in the applicable condition of entitlement. *See Hess v. Director, OWCP*, 21 BLR 1-141, 1-143 (1998). The administrative law judge was also required to determine whether there was a mistake in a determination of fact with regard to the prior denial of claimant's subsequent claim. The intended purpose of modification based on a mistake in a determination of fact is to vest the fact-finder "with broad discretion to correct mistakes of fact, whether demonstrated by wholly new evidence, cumulative evidence, or merely further reflection on the evidence initially submitted." *O'Keeffe v. Aerojet-General Shipyards, Inc.*, 404 U.S. 254 (1971).

³ We affirm the administrative law judge's finding that claimant established twenty years of underground coal mine employment, as unchallenged by the parties on appeal. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

⁴ This case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit, as claimant's coal mine employment was in Virginia. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989)(en banc); Director's Exhibit 4.

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, 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, 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. The United States Court of Appeals for the Fourth Circuit has held that, “[b]ecause prong (A) sets out an entirely objective scientific standard” for diagnosing complicated pneumoconiosis, that is, an x-ray opacity greater than one centimeter in diameter, the administrative law judge must determine whether a condition which is diagnosed by biopsy or autopsy under prong (B) or by other means under prong (C) would show as a greater-than-one-centimeter opacity if it were seen on a chest x-ray. *E. Associated Coal Corp. v. Director, OWCP [Scarbro]*, 220 F.3d 250, 255, 22 BLR 2-93, 2-100 (4th Cir. 2000); *Double B Mining, Inc. v. Blankenship*, 177 F.3d 240, 243, 22 BLR 2-554, 2-561-62 (4th Cir. 1999).

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 conflicts, and make a finding of fact. *See Westmoreland Coal Co. v. Cox*, 602 F.3d 276, 24 BLR 2-269 (4th Cir. 2010); *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).

Pursuant to 20 C.F.R. §718.304(a), the administrative law judge considered seven interpretations of three analog x-rays dated November 18, 2008, February 21, 2009 and February 22, 2011. Decision and Order at 15. Drs. DePonte and Alexander, both dually qualified as B readers and Board-certified radiologists, read the x-ray dated November 18, 2008 as positive for complicated pneumoconiosis, while Dr. Wheeler, also a dually qualified radiologist, noted the presence of a 5 centimeter mass in the right upper lung, but did not categorize it as a large opacity of complicated pneumoconiosis. Director’s Exhibits 14, 15, 32. Dr. Wheeler wrote in the comments section of the ILO form that the five centimeter mass was “compatible with conglomerate granulomatous disease with microbacterium avium complex or histoplasmosis more likely than [tuberculosis (TB)]” and recommended clinical correlation “because an exact diagnosis is needed for proper therapy.” Director’s Exhibit 15.

Regarding the analog x-ray dated February 21, 2009, Dr. DePonte found large category B opacities present bilaterally, showing “[coal workers’ pneumoconiosis (CWP)] with progressive massive fibrosis.” Director’s Exhibit 33. Dr. Wheeler

described a mass measuring 7 x 3 centimeters in the left lung and masses measuring 3 centimeters in the right lung. Director's Exhibit 35. Dr. Wheeler indicated that the masses were compatible with "adenopathy from granulomatous disease[,] with sarcoid, histoplasmosis or mycobacterium avium complex more likely than TB." *Id.* Dr. Wheeler also excluded complicated pneumoconiosis based on claimant's age, stating that claimant "is very young" and the National Institute for Occupational Safety and Health and the Mine Safety and Health Administration "became active [in] controlling dust levels in mines in [the] early 1970s . . . to prevent CWP." *Id.*

The analog x-ray obtained on February 22, 2011, was interpreted by Dr. DePonte as positive for complicated pneumoconiosis, while Dr. Wheeler noted the presence of an 8 centimeter mass in the left lung and masses ranging from 1.5 to 7 centimeters in size in the right lung. Claimant's Exhibit 8; Employer's Exhibit 9. Dr. Wheeler noted that all of the masses that he observed were compatible with conglomerate granulomatous disease with sarcoid or histoplasmosis, more likely than mycobacterium avium complex or TB. Employer's Exhibit 9. He further stated that, because the pattern of small nodules is asymmetrical and involves portions of all of the lung zones and the pleura, granulomatous disease is far more likely than any form of CWP. *Id.*

The administrative law judge stated that on the ILO form that Dr. Wheeler used to record his negative reading of the November 18, 2008 analog x-ray, "when asked if any of the parenchymal abnormalities were consistent with pneumoconiosis, he handwrote in question marks for 'yes' and did not check anything for 'no'." Decision and Order at 15. The administrative law judge further stated that Dr. Wheeler "did not discuss whether or not the opacities could also be consistent with complicated CWP and I find his opinion ambiguous on this point." *Id.* Similarly, the administrative law judge found that Dr. Wheeler's negative interpretations of the analog x-rays dated February 21, 2009 and February 22, 2011, were entitled to little weight, as Dr. Wheeler did not cite any objective evidence showing that claimant suffered from histoplasmosis or granulomatous disease and "fail[ed] to explain why [c]laimant could not be one of those rare 'young' miners, with coal dust exposure after the 1970s, who developed complicated [CWP]." *Id.* at 16-17, citing *Consolidation Coal Co. v. Director, OWCP [Beeler]*, 521 F.3d 723, 24 BLR 2-97 (7th Cir. 2008). The administrative law judge concluded, therefore, that the positive readings for complicated pneumoconiosis rendered by Drs. DePonte and Alexander outweighed Dr. Wheeler's negative readings, and were sufficient to establish the existence of the disease at 20 C.F.R. §718.304(a) and a change in condition at 20 C.F.R. §725.310. Decision and Order at 17.

Employer argues that the administrative law judge erred in applying a stricter standard to Dr. Wheeler's negative interpretations than she applied to the positive interpretations rendered by Drs. DePonte and Alexander. In support of this allegation, employer contends that the administrative law judge acted irrationally in discrediting Dr.

Wheeler's x-ray readings because he did not refer to any evidence of record showing that claimant suffers from granulomatous disease, mycobacterium avian complex, sarcoid disease, and/or histoplasmosis, and failed to explicitly discuss whether the opacities could also be consistent with complicated pneumoconiosis. Employer maintains that, in contrast, the administrative law judge did not require Drs. DePonte and Alexander, to discuss whether the opacities could also be consistent with granulomatous disease, histoplasmosis or sarcoidosis, or discuss any other objective evidence showing that claimant has pneumoconiosis.

Employer's allegations of error are without merit. The administrative law judge rationally found that Dr. Wheeler's negative reading of the November 18, 2002 analog x-ray was outweighed by the positive readings submitted by Drs. DePonte and Alexander, based on Dr. Wheeler's failure to unambiguously indicate whether the x-ray contained parenchymal abnormalities consistent with pneumoconiosis. *See Scarbro*, 220 F.3d at 255, 22 BLR at 2-100. In addition, the administrative law judge's discrediting of Dr. Wheeler's negative readings of the analog x-rays dated February 21, 2009 and February 22, 2011, is consistent with the decision of the United States Court of Appeals for the Fourth Circuit in *Cox*. The Fourth Circuit, within whose jurisdiction this case arises, held in *Cox* that an administrative law judge has the discretion to discount, as speculative and unsupported, negative x-ray readings for complicated pneumoconiosis when there is no evidence in the record that the claimant was ever diagnosed with, or treated for, any of the alternative diseases or conditions put forward by the physician as possible sources of the large masses present on the miner's x-rays. *Cox*, 602 F.3d at 285-87, 24 BLR at 2-284-87. Thus, the administrative law judge permissibly discredited Dr. Wheeler's negative readings of the analog x-rays of record obtained on February 21, 2009 and February 22, 2011. *Id.*

We also hold that, contrary to employer's allegation, the administrative law judge was not required to assess the extent to which Drs. DePonte and Alexander considered that claimant's x-rays established that he has a condition other than complicated pneumoconiosis. Although Drs. DePonte and Alexander noted the presence of "hilar enlargement" in the section of the ILO form requesting the identification of "[a]ny other abnormalities," and Dr. Alexander recommended a follow-up CT scan, the physicians' identification of this "other abnormality" was separate from their unequivocal classification of the analog x-rays as positive for complicated pneumoconiosis. Director's Exhibits 14, 32; *see Scarbro*, 220 F.3d at 255, 22 BLR at 2-100. We affirm, therefore, the administrative law judge's finding that the positive readings submitted by Drs. DePonte and Alexander were sufficient to establish the existence of complicated pneumoconiosis at 20 C.F.R. §718.304(a), and a change in conditions at 20 C.F.R. §725.310. *See Scarbro*, 220 F.3d at 255, 22 BLR at 2-100; *Hess*, 21 BLR at 1-143.

Pursuant to 20 C.F.R. §718.304(b), the administrative law judge considered biopsy reports submitted by Drs. Segen, Oesterling, Crouch and Stoler. Decision and Order at 17-18. Drs. Segen and Stoler diagnosed pneumoconiosis, but did not indicate whether it was simple or complicated. Director's Exhibits 32, 33. Dr. Oesterling diagnosed simple pneumoconiosis, but agreed with Dr. Crouch that the biopsies did not provide enough information to determine whether claimant has complicated pneumoconiosis. Director's Exhibit 1; Employer's Exhibit 5. Based on the absence of explicit diagnoses of complicated pneumoconiosis, and the opinions of Drs. Oesterling and Crouch, the administrative law judge determined that the biopsy evidence was "insufficient to either establish or exclude the presence of complicated CWP." Decision and Order at 18. The administrative law judge further concluded, however, that the biopsy evidence was sufficient to establish the existence of simple pneumoconiosis. *Id.*

On appeal, employer's sole statement regarding the administrative law judge's determinations at 20 C.F.R. §718.304(b) is that "the pathologic evidence . . . does not establish that claimant has complicated pneumoconiosis." Employer's Memorandum of Law at [8] (unpaginated). Because employer has not identified any error in the administrative law judge's findings that the biopsy evidence does not exclude the presence of complicated pneumoconiosis, and is sufficient to establish that claimant has simple pneumoconiosis, we affirm these findings. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

Pursuant to 20 C.F.R. §718.304(c), the administrative law judge considered two readings of a digital x-ray dated April 30, 2009, claimant's treatment records, and the medical reports of Drs. Agarwal, Fino and Vuskovich. Decision and Order at 8-13, 18-21. The administrative law judge determined that Dr. Wheeler's negative reading of the April 30, 2009 digital x-ray was outweighed by Dr. Alexander's positive reading, as Dr. Wheeler attributed the masses that he identified to conditions unrelated to coal dust exposure, without identifying evidence indicating that claimant suffered from these conditions. Decision and Order at 19; Director's Exhibit 34; Claimant's Exhibit 1. The administrative law judge found that claimant's treatment records were "insufficient . . . to establish either the presence or absence of complicated pneumoconiosis," as no physician "provide[d] enough detail to determine whether they [were] making a conclusive diagnosis of complicated CWP or the reasoning therefor." Decision and Order at 19; Director's Exhibits 31, 32; Claimant's Exhibits 3-6.

Regarding the medical opinion evidence, the administrative law judge found that the reports in which Drs. Agarwal and Fino diagnosed complicated pneumoconiosis were well-reasoned and entitled to the greatest weight. Decision and Order at 20; Director's Exhibits 14, 32. The administrative law judge determined that a supplemental report in which Dr. Fino stated that a biopsy of the right upper lobe of claimant's lungs would not meet the criteria for complicated pneumoconiosis was lacking in probative value because

it was vague and, therefore, not well-reasoned.⁵ Decision and Order at 20; Employer's Exhibit 6. The administrative law judge also discredited, as not well-supported by the evidence of record, Dr. Vuskovich's opinion that claimant's pulmonary densities are compatible with sarcoidosis. Decision and Order at 20-21; Employer's Exhibit 7. In conclusion, the administrative law judge found that the digital x-ray and medical opinion evidence were sufficient to establish the existence of complicated pneumoconiosis at 20 C.F.R. §718.304(c).

Employer contends that the administrative law judge's findings crediting Dr. Agarwal's diagnosis of complicated pneumoconiosis and discrediting Dr. Vuskovich's diagnosis of sarcoidosis must be vacated, as they were based on her inappropriate weighing of the analog x-ray evidence. Employer also alleges that the administrative law judge erred in failing to credit Dr. Fino's repudiation of his initial diagnosis of complicated pneumoconiosis. Employer's arguments lack merit.

Because we have affirmed the administrative law judge's determination that the analog x-ray evidence was sufficient to establish the existence of complicated pneumoconiosis at 20 C.F.R. §718.304(a), we reject employer's contention that the administrative law judge did not properly weigh the medical opinions of Drs. Agarwal and Vuskovich at 20 C.F.R. §718.304(c). *See Lester*, 993 F.2d at 1145-46, 17 BLR at 2-117-18; *Melnick*, 16 BLR at 1-33-34. With respect to the administrative law judge's discrediting of Dr. Fino's supplemental report, she permissibly found that it was vague because Dr. Fino did not identify in sufficient detail the biopsy that he relied on to change his opinion regarding the presence of complicated pneumoconiosis. *See Milburn Colliery*

⁵ Dr. Fino examined claimant on April 30, 2009 and submitted a report dated May 25, 2009. Director's Exhibit 32. Dr. Fino diagnosed complicated pneumoconiosis based, in part, on his reading of the digital x-ray dated April 30, 2009 and the pathology reports of Drs. Segen, Stoler and Crouch. *Id.* In a supplemental report dated January 11, 2012, Dr. Fino referred to a biopsy performed on the right lobe of claimant's lungs and stated:

Assuming that the biopsy in this case was a representative sample of the "B" sized large opacity which I described on the 2009 x-ray, then I certainly would change my mind with respect to the presence of complicated pneumoconiosis and state, with reasonable certainty, that the gold standard test for complicated pneumoconiosis did not prove that diagnosis.

Employer's Exhibit 6.

Co. v. Hicks, 138 F.3d 524, 533, 21 BLR 2-323, 2-335 (4th Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 441, 21 BLR 2-269, 2-275-76 (4th Cir. 1997). Moreover, the administrative law judge acted within her discretion in finding that the credibility of Dr. Fino’s supplemental report was diminished as, “even if the opacity that Dr. Fino described in his 2009 x-ray report was contradicted by the (unspecified) biopsy,” the x-ray interpretations of Drs. DePonte, Alexander and Wheeler describing bilateral large opacities mean that there are “additional large opacities unaddressed by the biopsy report.” Decision and Order at 20; see *Hicks*, 138 F.3d at 533, 21 BLR at 2-335; *Akers*, 131 F.3d at 441, 21 BLR at 2-275-76. We affirm, therefore, the administrative law judge’s determination that claimant established the existence of complicated pneumoconiosis at 20 C.F.R. §718.304(c), by a preponderance of the digital x-ray and medical opinion evidence.

Based on our affirmance of the administrative law judge’s findings at 20 C.F.R. §718.304(a)-(c), we further affirm the administrative law judge’s determination that, when weighed together, the relevant evidence of record as a whole is sufficient to satisfy claimant’s burden to establish the existence of complicated pneumoconiosis, and invocation of the irrebuttable presumption of total disability due to pneumoconiosis at 20 C.F.R. §718.304. See *Cox*, 602 F.3d at 285, 24 BLR at 2-284; *Scarbro*, 220 F.3d at 255, 22 BLR at 2-100; Decision and Order at 21. We also affirm, as unchallenged on appeal, the administrative law judge’s finding that claimant’s complicated pneumoconiosis arose out of his coal mine employment pursuant to 20 C.F.R. §718.203(b). See *Skrack*, 6 BLR at 1-711; Decision and Order at 22. Thus, we affirm the administrative law judge’s determinations that claimant established a change in an applicable condition of entitlement, and a change in conditions at 20 C.F.R. §§725.309 and 725.310. See *White*, 23 BLR at 1-3; *Hess*, 21 BLR at 1-143.

Accordingly, the administrative law judge's Decision and Order Awarding Benefits on Modification is affirmed.

SO ORDERED.

BETTY JEAN HALL, Acting Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge