BRB No. 04-0119 BLA

JOHN P. LOONEY	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
SHADY LANE COAL CORPORATION	)	DATE ISSUED: 11/26/2004
	)	
Employer-Petitioner	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order on Remand Granting Modification and Benefits of Pamela Lakes Wood, Administrative Law Judge, United States Department of Labor.

Joseph E. Wolfe and W. Andrew Delph Jr. (Wolfe Williams & Rutherford), Norton, Virginia, for claimant.

Ronald E. Gilbertson (Bell, Boyd & Lloyd), Washington, D.C., for employer.

Barry H. Joyner (Howard M. Radzely, Solicitor of Labor; Donald S. Shire, Associate Solicitor; Rae Ellen Frank James, Deputy 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, HALL and BOGGS, Administrative Appeals Judges.

DOLDER, Chief Administrative Appeals Judge:

Employer appeals the Decision and Order on Remand Granting Modification and Benefits (02-BLA-0122) of Administrative Law Judge Pamela Lakes Wood on a duplicate 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 is before the Board for the second time. Upon initial consideration, Administrative Law Judge Edward J. Murty credited claimant[2] with fifteen years, three months, and twenty-three days of qualifying coal mine employment and adjudicated the claim on its merits pursuant to 20 C.F.R. Part 718. Judge Murty found that claimant failed to establish invocation of the irrebuttable presumption of total disability due to pneumoconiosis provided at 20 C.F.R. §718.304 (2000), and accordingly, denied benefits. *See* 30 U.S.C. §921(c)(3); Director's Exhibit 37. Subsequently, claimant filed a request for reconsideration which was denied by Associate Chief Administrative Law Judge Thomas M. Burke. Director's Exhibit 39.

Claimant appealed the denial of benefits and his request for reconsideration. The Board, in *Looney v. Shady Lane Coal Corp.*, BRB No. 99-0284 BLA (Dec. 14, 1999) (unpub.), affirmed Judge Murty's finding that because claimant retained the pulmonary capacity to perform his usual coal mine employment, he failed to establish total respiratory disability pursuant to 20 C.F.R. §718.204(c) (2000).[3] The Board further affirmed Judge Murty's determination that claimant failed to establish invocation of the irrebuttable presumption provided at Section 718.304 as supported by substantial evidence. Hence, the Board affirmed both Judge Murty's Decision and Order denying benefits and Judge Burke's Decision and Order Denying Reconsideration. Director's Exhibit 49.

Thereafter, claimant filed a petition for modification with supporting evidence on March 30, 2000, which was denied by the district director on October 3, 2000. Director's Exhibits 50, 86. Claimant filed a second petition for modification with supporting evidence on January 17, 2001, which was similarly denied by the district director on August 7, 2001.

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

[2] Claimant, John P. Looney, filed his first application for benefits on July 19, 1991, which was finally denied on November 25, 1991. Director's Exhibits 139-1, 139-16. Claimant took no further action on this claim. Subsequently, claimant filed a duplicate application for benefits on November 22, 1996, which is pending herein. Director's Exhibit 1.

[3] Pursuant to 20 C.F.R. §718.204(c)(1)-(4) (2000), the Board noted that claimant was precluded from establishing total respiratory disability because all of the pulmonary function studies and blood gas studies of record were non-qualifying, there was no evidence of cor pulmonale with right-sided congestive heart failure, and the medical opinion evidence was insufficient to demonstrate total respiratory disability. *Looney v. Shady Lane Coal Corp.*, BRB No. 99-0284 BLA, *slip op.* at 3 n.3 (Dec. 14, 1999) (unpub.); Director's Exhibit 49.

Director's Exhibits 8, 134. Thereafter, claimant requested a formal hearing which was held before Administrative Law Judge Pamela Lakes Wood (the administrative law judge) on May 23, 2002.

Recognizing that this case involves a petition for modification of the denial of a duplicate claim, the administrative law judge addressed the issues of total respiratory disability at 20 C.F.R. §718.204(b) and invocation of the irrebuttable presumption provided at 20 C.F.R. §718.304, as these issues were adjudicated against claimant in Judge Murty's prior denial. The administrative law judge determined that the evidence submitted since the prior denial failed to demonstrate total respiratory disability pursuant to 20 C.F.R. §718.204(b)(2)(i)-(iv). With respect to Section 718.304(a), the administrative law judge found that, while the most recent x-ray interpretations supported a finding of complicated pneumoconiosis, the x-ray evidence was in equipoise, and hence, insufficient to invoke the irrebuttable presumption under this subsection. Similarly, the administrative law judge determined that the CT scan evidence did not resolve the issue of whether claimant suffers from complicated pneumoconiosis. The administrative law judge additionally found, however, that the medical opinion of Dr. Forehand and the CT scan evidence submitted since the prior denial "weighed slightly in favor of a finding of complicated pneumoconiosis" pursuant to Section 718.304(c).[4] Decision and Order at 19. After considering the newly submitted x-ray interpretations, CT scan reports, and medical opinions, the administrative law judge determined that claimant established that he suffers from complicated pneumoconiosis, and therefore, that claimant established invocation of the irrebuttable presumption of total disability due to pneumoconiosis provided at Section 718.304. *See* 30 U.S.C. §921(c)(3). Accordingly, benefits were awarded. The administrative law judge further ordered benefits to commence as of January 1997, the month in which Dr. Forehand first diagnosed claimant with complicated pneumoconiosis.

On appeal, employer argues that the administrative law judge erred by not comparing the previously submitted evidence with the newly submitted evidence when rendering her determination with respect to modification and by not addressing whether granting claimant's modification request would "render justice under the Act." Employer argues further that the administrative law judge erred in relying on Dr. Forehand's diagnosis of complicated pneumoconiosis to establish invocation of the irrebuttable presumption pursuant to Section 718.304(c) and in failing to weigh all the relevant evidence together, particularly the x-ray and CT scan evidence, before concluding that claimant established invocation of the irrebuttable presumption provided at Section 718.304. Finally, employer challenges the administrative law judge's determination with respect to the date of the commencement of

[4] The administrative law judge correctly noted that because there is no biopsy evidence of record, invocation of the irrebuttable presumption cannot be established under 20 C.F.R. §718.304(b). Decision and Order at 14.

benefits, asserting that because this award of benefits was based on a change in conditions, the date for commencement of benefits cannot precede the date of the prior denial. Claimant responds, urging affirmance of the administrative law judge's award of benefits. The Director, Office of Workers' Compensation Programs (the Director), as party-in-interest, has filed a limited response letter. The Director disagrees with employer's arguments that the administrative law judge erred by not comparing the previously submitted evidence with the newly submitted evidence in determining whether the new evidence established a deterioration in claimant's condition and by not addressing whether granting modification would render justice under the Act.

The Board's scope of review is defined by statute. If the administrative law judge's findings of fact and conclusions of law are supported by substantial evidence, are rational, and are consistent with the applicable law, they are binding upon this Board and may not be disturbed. 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).

Employer argues that the administrative law judge failed to adequately explain her "conclusory" finding that Dr. Forehand's diagnosis of complicated pneumoconiosis was sufficient to establish a change in conditions. Relying on the decision of the United States Court of Appeals for the Sixth Circuit in *Tennessee Consolidation Coal Co. v. Kirk*, 264 F.3d 602, 22 BLR 2-288 (6th Cir. 2001), relevant to duplicate claims, employer argues that the administrative law judge failed to explain how claimant's condition deteriorated since the district director's October 3, 2000 denial of claimant's previous request for modification. The Director argues that *Kirk* is inapplicable because this case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit, which explicitly rejected, in *Lisa Lee Mines v. Director, OWCP* [*Rutter*], 86 F.3d 1358, 20 BLR 2-227 (4th Cir. 1996)(*en banc*), *rev'g* 57 F.3d 402, 19 BLR 2-223 (4th Cir. 1995), the Sixth Circuit's requirement that the adjudicator compare the old and new evidence to determine whether a claimant's condition has deteriorated since the prior denial in order to establish a material change in conditions under Section 725.309 (2000).

In this duplicate claim filed on November 22, 1996, claimant must establish a material change in conditions pursuant to Section 725.309 (2000) since the prior denial. In *Rutter*, the Fourth Circuit held that in order to establish a material change in conditions, claimant must establish by a preponderance of the evidence developed subsequent to the denial of the prior claim, at least one of the elements of entitlement previously adjudicated against him. *Rutter*, 86 F.3d at 1361, 20 BLR at 2-235. In cases where there is a petition for modification of a duplicate claim, and the district director has denied modification of the duplicate claim, the administrative law judge should consider whether the newly submitted evidence is sufficient to establish a material change in conditions pursuant to Section 725.309 rather than determine whether claimant has established a basis for modification of his duplicate claim pursuant to Section 725.310. *Hess v. Director, OWCP*, 21 BLR 1-141, 1-143 (1998).

This case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit because claimant's last coal mine employment occurred in the state of Virginia. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (*en banc*); Director's Exhibit 2. In that circuit, disproof of the continuing validity of one of the previous holdings is enough to establish a material change in conditions. *See Rutter*, 86 F.3d at 1363, 20 BLR at 2-237; *Allen v. Mead Corporation*, 22 BLR 1-63, 1-66 (2000) (*en banc*); Decision and Order at 9-19. We, therefore, reject employer's argument that the administrative law judge erred by not applying *Kirk* to determine the threshold duplicate claim issue.

Employer next argues that because the administrative law judge found that claimant established a material change in conditions under Section 725.309 (2000) and thereby established a basis for modification under Section 725.310, she erred by not determining whether modifying the prior denial would "render justice under the Act." The Director urges that since employer did not raise this issue before the administrative law judge, employer has effectively waived it. A review of the record reveals that employer did not raise this issue while the case was pending before the administrative law judge. *See* Hearing Transcript at 6-22; Director's Exhibit 140. We therefore decline to consider it further. *See Toler v. Eastern Associated Coal Corp.*, 43 F.3d 109, 19 BLR 2-70 (4th Cir. 1995); *Thorn v. Itmann Coal Co.*, 3 F.3d 713, 18 BLR 2-16 (4th Cir. 1993); *Lyon v. Pittsburgh & Midway Coal Co.*, 7 BLR 1-199, 1-201 (1984) (issue must be raised before administrative law judge before Board will consider it on appeal); *see also Bracher v. Director, OWCP*, 14 F.3d 1157, 18 BLR 2-97 (7th Cir. 1994).

With respect to Section 718.304(c), employer contends that the administrative law judge erred in relying on Dr. Forehand's diagnosis of complicated pneumoconiosis because Dr. Forehand relied upon his x-ray and CT scan interpretations that the administrative law judge had previously discounted as being insufficient to establish that claimant has complicated pneumoconiosis. Employer further asserts that the administrative law judge, by not weighing Dr. Forehand's opinion in conjunction with all of the conflicting x-ray and CT scan evidence, failed to weigh all the relevant evidence together, as required, under Section 718.304(a), (b), and (c), before determining whether claimant established invocation of the irrebuttable presumption thereunder. Employer's argument has merit.

While Section 718.304(a), (b), and (c) set forth three different methods by which a claimant can invoke the irrebuttable presumption of total disability due to pneumoconiosis, the administrative law judge must in every case review all relevant evidence. 30 U.S.C. §923(b); *Mullins Coal Co. of Va. v. Director, OWCP*, 484 U.S. 135, 11 BLR 2-1 (1987), *reh'g denied*, 484 U.S. 1047 (1988); *Eastern Associated Coal Corp. v. Director, OWCP* [*Scarbro*], 220 F.3d 250, 22 BLR 2-93 (4th Cir. 2000); *Melnick v. Consolidation Coal Co.*, 16 BLR 1-31, 1-33 (1991) (*en banc*). The Fourth Circuit has specifically held that evidence under one prong of Section 718.304 can diminish the probative value of evidence under

another prong if the two forms conflict; however, a single piece of relevant evidence can support an administrative law judge's finding that the irrebuttable presumption was successfully invoked if that piece of evidence outweighs the conflicting evidence of record. *Scarbro*, 220 F.3d at 256, 22 BLR at 2-101, *citing Lester v. Director, OWCP*, 993 F.2d 1143, 1145, 17 BLR 2-114, 2-117 (4th Cir. 1993). Further, as Section 718.304 offers no opportunity for rebuttal, failure to require an administrative law judge to consider all relevant evidence at the invocation stage may violate an opposing party's right to due process. *Melnick*, 16 BLR at 1-33.

After examining the newly submitted x-ray evidence in conjunction with the previously submitted x-ray evidence pursuant to Section 718.304(a), the administrative law judge found that the x-ray evidence was "in equipoise" on the issue of whether claimant has complicated pneumoconiosis. Decision and Order at 13-14. Assessing the conflicting CT scan evidence under Section 718.304(c), the administrative law judge further stated that "the CT scan evidence does not resolve the issue of complicated pneumoconiosis, although Dr. Navani's report, which is the only one providing sufficient information for equivalency to be determined, supports a finding of complicated pneumoconiosis." Decision and Order at 15-16. The administrative law judge, however, subsequently considered the CT scan interpretations in conjunction with the physicians' opinions under her examination of the evidence at Section 718.304(c), and concluded that this evidence, including the medical opinion of Dr. Forehand and the CT scan interpretation of Dr. Navani, "weigh[] slightly in favor of a finding of complicated pneumoconiosis," and that these physicians' diagnoses of complicated pneumoconiosis were controlling. Decision and Order at 19. The administrative law judge's determination that claimant established invocation of the irrebuttable presumption pursuant to Section 718.304(c) based on the opinion of Dr. Forehand, who relied on x-ray and CT scan evidence thus, conflicts with her findings that the x-ray and CT scan evidence was inconclusive under Section 718.304(a) and (c), respectively. The administrative law judge failed to resolve this conflict inherent in her finding at Section 718.304 and we thus vacate this determination. *See Double B Mining, Inc. v. Blankenship*, 177 F.3d 240, 243-244, 22 BLR 2-554, 2-561-562 (4th Cir. 1999); *Lester*, 993 F.2d at 1145-1146, 17 BLR at 2-117-118; *Melnick*, 16 BLR at 33.

Based on the foregoing, we remand the case for the administrative law judge to conduct a full and comparative weighing of all relevant evidence at Section 718.304(a) and (c). The administrative law judge must determine whether the evidence is sufficient to invoke the irrebuttable presumption at Section 718.304, and provide adequate rationale for her findings. *See Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162 (1989); *Vickery v. Director, OWCP*, 8 BLR 1-430 (1986). Specifically, should the administrative law judge find on remand that Dr. Forehand's opinion is worthy of determinative weight, she must explain how the documentation underlying Dr. Forehand's opinion supports his ultimate conclusion that claimant suffers from complicated pneumoconiosis and not from alternate conditions diagnosed by employer's experts including Drs. Hippensteel and Castle. *See*

Trumbo v. Reading Anthracite Co., 17 BLR 1-85, 1-88-89 (1993); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989) (*en banc*); *Carpeta v. Mathies Coal Co.*, 7 BLR 1-145, 1-147 (1984). Moreover, the administrative law judge's weighing of the evidence on remand must comport with "the Fourth Circuit's mandate in *Blankenship* that the administrative law judge is bound to perform equivalency determinations to make certain that, regardless of which diagnostic technique is used, the same underlying condition triggers the irrebuttable presumption." *Braenovich v. Cannelton Industries, Inc./Cypress Amax*, 22 BLR 1-236, 1-245 (2003) (Gabauer, J., concurring); *Blankenship*, 177 F.3d at 243, 22 BLR 2-561.[5] Further, the Fourth Circuit has "clearly stated that '[n]either this circuit nor the Benefits Review Board has ever fashioned a requirement or a presumption that treating physicians be given greater weight than opinions of other expert physicians.'" *Consolidation Coal Co. v. Held*, 314 F.3d 184, 187, 22 BLR 2-564, 2-571 (4th Cir. 2002), *citing Grizzle v. Pickands Mather and Co.*, 994 F.2d 1093, 1097, 17 BLR 2-123, 2-128-129 (4th Cir. 1993); *Grigg v. Director, OWCP*, 28 F.3d 416, 420, 18 BLR 2-299, 2-307 (4th Cir. 1994). Consequently, on remand, the administrative law judge should assess the probative value of Dr. Forehand's opinion in light of the aforementioned case law concerning the treatment of treating physicians' opinions.

Finally, employer contends that the administrative law judge erred in determining that benefits commence as of January 1, 1997. Citing Section 725.503(d)(2), employer argues that because the district director's most recent denial was issued on October 3, 2000, benefits cannot be awarded in this claim prior to that date. The regulation set forth in Section 725.503 provides that if a claim is awarded pursuant to a request for modification under Section 725.310, the date from which benefits are payable shall be determined in accordance with Section 725.503(d)(1) (mistake in a determination of fact) or Section 725.503(d)(2) (change in conditions). *See* 20 C.F.R. §725.503(d)(1), (2). Because we herein vacate the administrative law judge's finding of entitlement to benefits, we similarly vacate her finding as to the date from which benefits commence. If, on remand, the administrative law judge finds that claimant establishes entitlement to benefits, then she must again determine the date from which benefits commence. *See generally Williams v. Director, OWCP*, 13 BLR 1-28, 1-30 (1989).

Accordingly, the Decision and Order Granting Modification and Benefits of the administrative law judge is vacated and the case is remanded for proceedings consistent with this opinion.

[5] We note that the administrative law judge determined that Dr. Forehand, in his CT scan interpretation, explained why he found that the appearance of abnormalities constituted complicated pneumoconiosis as opposed to tuberculosis, fungal lung disease, and malignancy, yet found that Dr. Forehand did not provide a description of the size, shape, and location of the masses or nodules to enable her to render an equivalency determination. Decision and Order at 15; Director's Exhibit 61.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

I concur.

JUDITH S. BOGGS
Administrative Appeals Judge

HALL, Administrative Appeals Judge, dissenting:

I respectfully dissent from my colleagues' decision to vacate the administrative law judge's finding that claimant established invocation of the irrebuttable presumption of total disability due to pneumoconiosis based on a finding that claimant has complicated pneumoconiosis, 30 U.S.C. §921(c)(3), as implemented by 20 C.F.R. §718.304. The administrative law judge's determinations at Section 718.304 are supported by substantial evidence, including the medical opinion of Dr. Forehand, the CT scan interpretation of Dr. Navani, and the x-ray report of Dr. Sargent. The administrative law judge, within a permissible exercise of her discretion, relied on the opinion of Dr. Forehand, claimant's treating physician whom she found possessed "impressive" credentials, because Dr. Forehand, unlike Drs. Hippensteel and Castle, seriously considered the possibility of malignancy as an etiology for the findings on claimant's x-rays and CT scans and adequately explained why he believed that such findings were not actually related to carcinoma. *See* Director's Exhibit 61. The administrative law judge further properly found that Dr. Forehand's opinion was entitled to significant weight because his diagnosis of complicated pneumoconiosis was based on the physical examinations he administered, objective tests he conducted, and CT scans and other diagnostic tests he reviewed. *See Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 21 BLR 2-323 (4th Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 21 BLR 2-269 (4th Cir. 1997); *Grizzle v. Pickands Mather and Co.*, 994 F.2d 1093, 17 BLR 2-123 (4th Cir. 1993); Decision and Order at 18. Consequently, the administrative law judge was persuaded by Dr. Forehand's consideration of alternate etiologies for claimant's condition such as tuberculosis and other granulomatous diseases, as diagnosed by Drs. Hippensteel and Castle, but she found it significant that Dr. Forehand conducted appropriate testing to exclude these conditions during his treatment of claimant.

See Decision and Order at 18. Moreover, the administrative law judge's findings comport with the holding of the United States Court of Appeals for the Fourth Circuit in *Eastern Associated Coal Corp. v. Director, OWCP* [*Scarbro*], 220 F.3d 250, 256, 22 BLR 2-93, 2-101 (4th Cir. 2000), that " 'a single piece of relevant evidence' … can support an ALJ's finding that the irrebuttable presumption was successfully invoked if that piece of evidence outweighs conflicting evidence on the record," provided that the administrative law judge performs an equivalency determination to make certain that, regardless of which diagnostic technique is used, the same underlying condition triggers the irrebuttable presumption. *Double B Mining, Inc. v. Blankenship*, 177 F.3d 240, 243, 22 BLR 2-554, 2-561 (4th Cir. 1999); *Lester v. Director, OWCP*, 993 F.2d 1143, 1145, 17 BLR 2-114, 2-117 (4th Cir. 1993). Unlike my colleagues, therefore, I would uphold the administrative law judge's decision to rely on Dr. Forehand's opinion at Section 718.304(c). *See Hicks*, 138 F.3d at 537, 21 BLR at 2-341; *Zbosnik v. Badger Coal Co.*, 759 F.2d 1187, 1189, 7 BLR 2-202, 2-207 (4th Cir. 1985); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989) (*en banc*).

In addition, the administrative law judge rationally found that the CT scan reports of Drs. Wheeler and Scott, who opined that claimant has some form of granulomatous disease and did not suffer from complicated pneumoconiosis, were less probative because the CT scan interpretations of Drs. Navani and Forehand, the medical opinion of Dr. Forehand, which is corroborated by the opinions of Drs. Robinette and Rasmussen, and the x-ray interpretation of Dr. Sargent, definitively established that the masses and nodules on claimant's lungs were a progression of claimant's simple pneumoconiosis that has manifested into complicated coal workers' pneumoconiosis. Moreover, the administrative law judge properly found that only Dr. Navani's CT scan interpretation provided ample information for rendering an equivalency determination because he utilized the International Labour Organization Union Internationale Contra Cancer/Cinncinati (1971) system for classifying x-rays to diagnose size "A" large opacities. *See Scarbro*, 220 F.3d at 256, 22 BLR at 2-100; *Blankenship*, 177 F.3d at 244, 22 BLR at 2-562; Decision and Order at 15.

Because the administrative law judge weighed all relevant evidence, I would affirm her decision to award benefits based on a finding that claimant established invocation of the irrebuttable presumption of total disability due to pneumoconiosis at Section 718.304.

BETTY J. HALL
Administrative Appeals Judge