BRB No. 05-0251 BLA

CLYDE C. LAMBERT	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
CLINCHFIELD COAL COMPANY	)	DATE ISSUED: 11/30/2005
	)	
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 of Linda S. Chapman, Administrative Law Judge, United States Department of Labor.

Gerald F. Sharp (Gerald F. Sharp, P.C.), Lebanon, Virginia, for claimant.

Timothy W. Gresham (Penn, Stuart & Eskridge), Abingdon, Virginia, for employer.

Rita Roppolo (Howard M. Radzely, Solicitor of Labor; Allen H. Feldman, 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:

Employer appeals the Decision and Order on Remand (00-BLA-0298) of Administrative Law Judge Linda S. Chapman awarding 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 been before the Board previously, and the complete procedural history, set forth in the Board's prior decisions, need not be repeated herein.[2] In the most recent appeal, by Decision and Order dated March 26, 2004, the Board vacated the administrative law judge's finding that the x-ray evidence is sufficient to establish the existence of complicated pneumoconiosis pursuant to 20 C.F.R. §410.418(a), and thus a change in conditions pursuant to 20 C.F.R. §725.310, and further held that the administrative law judge failed to independently evaluate whether the computerized tomography (CT) scan evidence was sufficient to establish the existence of complicated pneumoconiosis pursuant to 20 C.F.R. §410.418(c).[3] *Lambert v. Clinchfield Coal Co.*, BRB No. 03-0464 BLA (Mar. 26, 2004) (unpublished). The Board instructed the administrative law judge to reconsider all relevant evidence pursuant to 20 C.F.R. §410.418, in accordance with the standard set out in *Eastern Associated Coal Corp. v. Director, OWCP* [*Scarbro*], 220 F.3d 250, 22 BLR 2-93 (4th Cir. 2000), in determining whether the evidence is sufficient to establish a change in conditions pursuant to 20 C.F.R. §725.310. *Id*.

On remand, the administrative law judge found that the evidence was sufficient to establish the existence of complicated pneumoconiosis pursuant to 20 C.F.R. §410.418(a), and thus a change in conditions pursuant to 20 C.F.R. §725.310. Considering all the evidence on the merits, the administrative law judge found the evidence sufficient to establish entitlement based on the irrebuttable presumption of total disability due to pneumoconiosis pursuant to 20 C.F.R. §418.418. Accordingly, the administrative law judge awarded benefits.

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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] A complete procedural history of this case can be found in *Lambert v. Clinchfield Coal Co.*, BRB No. 03-0464 BLA (Mar 26, 2004)(unpub.) and *Lambert v. Clinchfield Coal Co.*, BRB No. 01-0514 BLA (Mar 8, 2002)(unpub.).

[3] In *Eastern Associated Coal Corp. v. Director, OWCP* [*Scarbro*], 220 F.3d 250, 22 BLR 2-93 (4th Cir. 2000), the Fourth Circuit observed that because prongs (a), (b), and (c) are stated in the disjunctive, a finding of statutory complicated pneumoconiosis may be based on evidence presented under a single prong. However, in every case, the administrative law judge must review the evidence under each prong for which relevant evidence is presented to determine whether complicated pneumoconiosis is present.

On appeal, employer contends that the administrative law judge erred in finding the evidence sufficient to establish the existence of complicated pneumoconiosis. Claimant responds in support of the administrative law judge's award of benefits. The Director, Office of Workers' Compensation Programs, has filed a limited response to employer's appeal, but does not advocate a position on the ultimate outcome of this case.

The Board must affirm the findings of the administrative law judge if they are supported by substantial evidence, are rational, and are 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).

Employer asserts that, on remand, the administrative law judge simply repeated her prior errors in weighing the x-ray and CT scan evidence, and in ultimately concluding that the x-ray evidence was sufficient to establish the existence of complicated pneumoconiosis pursuant to 20 C.F.R. §410.418(a). Employer's Brief at 14-17. We disagree.

In weighing the evidence on remand pursuant to 20 C.F.R. §410.418(a), (c) and 20 C.F.R. §725.310, the administrative law judge initially considered the sixty-nine readings of the ten new chest x-rays, which included four readings that were positive only for simple pneumoconiosis, twenty-one readings that were positive for pneumoconiosis with Category A large opacities, and forty-four readings that were completely negative for pneumoconiosis, but were all noted to reveal some irregularities suggestive of tuberculosis, granulomatous disease or malignancy. 2004 Decision and Order on Remand at 9; Claimant's Exhibits 1-8; Director's Exhibits 179, 183-186, 188-191, 194, 195; Employer's Exhibits 1-5, 7, 9-21, 25, 27-29, 30-38. Considering the CT scan evidence, the administrative law judge noted that the record contained one positive diagnosis of simple pneumoconiosis, three positive diagnoses of complicated pneumoconiosis, and nine readings that were negative for pneumoconiosis, but, as with the x-rays, were noted to reveal some irregularities suggestive of tuberculosis, granulomatous disease or malignancy. 2004 Decision and Order on Remand at 14-18.

Considering whether the negative x-ray and CT scan evidence outweighed the positive evidence, in light of the Board's prior instructions, the administrative law judge explained that because, in this case, there is no medical evidence in the record to corroborate any of the proposed alternative diagnoses, and because these physicians' opinions are speculative and unpersuasive as to the etiology of the masses seen, she found the negative x-ray and CT scan readings, including those by Drs. Wheeler, Scott, Gogineni, Abramowitz, Binns, Baek, Fino, Scatarige, Hayes, Hippensteel, Robinette and Dahhan, to be of little probative value. 2004 Decision and Order on Remand at 11 n.7, 12-13, 17-18. The administrative law judge permissibly concluded that, therefore, the probative value of the twenty-one Category A x-ray readings was not outweighed either

by the other x-ray findings or by the CT findings, and, thus, was sufficient to invoke the irrebuttable presumption of total disability due to pneumoconiosis at 20 C.F.R. §410.418(a), and, consequently, sufficient to establish a change in conditions pursuant to 20 C.F.R. §725.310.[4] *United States Steel Mining Co., Inc. v. Director, OWCP* [*Jarrell*], 187 F.3d 384, 21 BLR 2-639 (4th Cir. 1999); *Piney Mountain Coal Co. v. Mays*, 176 F.3d 753, 21 BLR 2-587 (4th Cir. 1999); *Justice v. Island Creek Coal Co.*, 11 BLR 1-91, 1-94 (1988); *see Betty B Coal Co. v. Director, OWCP* [*Stanley*], 194 F.3d 491, 22 BLR 2-1 (4th Cir. 1999); *see also Scarbro*, 220 F.3d at 250, 22 BLR at 2-93; *Double B Mining, Inc. v. Blankenship*, 177 F.3d 240, 22 BLR 2-554 (4th Cir. 1999); 2004 Decision and Order on Remand at 18. The administrative law judge then reviewed all of the old and new evidence together on the merits, as instructed by the Board, and noted that the prior evidence of record contains only one x-ray reading of a Category A opacity, and no CT scan results. 2004 Decision and Order on Remand at 19. The administrative law judge acted within her discretion in according greater weight to the more probative, recent evidence, which she found sufficient to invoke the irrebuttable presumption of total disability due to pneumoconiosis at 20 C.F.R. §410.418(a), and awarded benefits. *Adkins v. Director, OWCP*, 958 F.2d 49, 16 BLR 2-61 (4th Cir. 1992); *Wilt v. Wolverine Mining Co.*, 14 BLR 1-70 (1990); 2004 Decision and Order on Remand at 18-20.

We hold that, on remand, the administrative law judge acted reasonably in again according little probative value to the negative x-ray and CT scan readings of record, and that her findings are not inherently incredible. *See United States v. U.S. Smelting, Refining & Mining Co.*, 339 U.S. 186 (1950), *reh'g denied*, 339 U.S. 972 (1950)(holding that the rule of law of the case is a discretionary rule of practice); *Cale v. Johnson*, 861 F.2d 943, 947 (6th Cir. 1988); *Brinkley v. Peabody Coal Co.*, 14 BLR 1-147 (1990); *Williams v. Healy-Ball-Greenfield*, 22 BRBS 234 (1989). Contrary to employer's arguments, on remand the administrative law judge fully explained that she did not

[4] The administrative law judge weighed the CT evidence at 20 C.F.R. §410.418(c), as instructed by the Board, and properly found that while all the CT results revealed significant abnormalities, as no physician had specifically indicated that these findings would equate to opacities of at least one centimeter on x-ray, the CT scan results were insufficient, in themselves, to support a finding of complicated pneumoconiosis. 20 C.F.R. §410.418(c); see *Scarbro*, 220 F.3d at 256, 22 BLR at 2-101; *Braenovich v. Cannelton Industries, Inc./Cypress Amax*, 22 BLR 1-236 (2003); 2004 Decision and Order on Remand at 17. In addition, the administrative law judge properly found that as the record contains no biopsy or autopsy evidence, the provisions at 20 C.F.R. §410.418(b) are inapplicable to this claim. As these findings are rational, supported by the record, and are unchallenged on appeal, they are hereby affirmed. *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).

require employer's doctors to prove the etiology of the x-ray and CT abnormalities seen, but rather undertook a reasonable analysis of the opinions to determine their credibility and ultimately found more persuasive the opinions of those physicians diagnosing Category A opacities on x-ray. *Jarrell*, 187 F.3d at 384, 21 BLR at 2-639; *Mays*, 176 F.3d at 753, 21 BLR at 2-587; *Justice v. Island Creek Coal Co.*, 11 BLR at 1-91, 1-94; *see also Scarbro*, 220 F.3d at 250, 22 BLR at 2-93; *Blankenship*, 177 F.3d at 240, 22 BLR at 2-554; *see Newport News Shipbldg. & Dry Dock Co. v. Cherry*, 326 F.3d 449, 452, 37 BRBS 6, 8 (CRT) (4th Cir. 2003); *Newport News Shipbldg. & Dry Dock Co. v. Tann*, 841 F.2d 540, 543 (4th Cir. 1988).

Employer further asserts pursuant to 20 C.F.R. §410.418(a), that the administrative law judge erred in crediting Dr. DePonte's August 2, 1998, August 18, 1998 and April 23, 1999 x-rays, which the physician read positive for complicated pneumoconiosis but negative for simple pneumoconiosis, because complicated pneumoconiosis always arises in a background of simple pneumoconiosis. Employer's Brief at 11-12. We disagree. As instructed by the Board, on remand the administrative law judge fully discussed this discrepancy in Dr. DePonte's x-ray readings and properly noted that on each of these x-ray interpretations, in addition to finding Category A large opacities, Dr. DePonte also indicated that there were parenchymal abnormalities consistent with pneumoconiosis, but that these abnormalities were simply in an insufficient profusion to qualify as a finding of simple pneumoconiosis. Director's Exhibit 186; 2004 Decision and Order on Remand at 13. Thus, as the administrative law judge properly addressed this aspect of Dr. DePonte's August 2, 1998, August 18, 1998 and April 23, 1999 x-ray readings, and explained why she found his diagnoses of complicated pneumoconiosis not inconsistent with his additional findings that claimant did not have simple pneumoconiosis, we affirm the administrative law judge's conclusion that Dr. De Ponte's x-ray readings are credible. *Island Creek Coal Co. v. Compton*, 211 F.3d 203, 211, 22 BLR 2-162, 2-175 (4th Cir. 2000); *Mays*, 176 F.3d at 753, 21 BLR at 2-587; *Grizzle v. Pickands Mather & Co./Chisolm Mines*, 994 F.2d 1093, 1096, 17 BLR 2-123, 2-127 (4th Cir. 1993).

Employer also asserts that the administrative law judge erred in crediting Dr. DePonte's somewhat speculative December 12, 1999 x-ray reading, in which the physician affirmatively indicated Category A large opacities on the ILO form, but stated in the accompanying narrative report that the opacity "could" represent complicated pneumoconiosis. Claimant's Exhibit 3; Employer's Brief at 13. Again, we disagree. On remand, the administrative law judge fully complied with the Board's instructions to address the speculative nature of the narrative comments accompanying Dr. DePonte's December 13, 1999 x-ray reading, and permissibly concluded that, while speculative, the x-ray reading nonetheless supports the other physicians of record making the same diagnosis. Decision and Order at 13 n.10. As the administrative law judge was not required to discount Dr. DePonte's opinion as speculative, *Mays*, 176 F.3d at 763, 21

BLR at 2-605, and properly explained the basis for according Dr. Deponte's December 13, 1999 reading some weight, *Jarrell*, 187 F.3d at 384, 21 BLR at 2-639, we affirm the administrative law judge's finding with respect thereto.

Therefore, as the administrative law judge fully complied with the Board's instructions on remand, and explained her findings with supporting rationale, *Compton*, 211 F.3d at 211, 22 BLR at 2-175; *Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 528, 21 BLR 2-323, 2-326 (4th Cir. 1998), we affirm the administrative law judge's findings that the evidence was sufficient to establish the existence of complicated pneumoconiosis pursuant to 20 C.F.R. §410.418(a), and thus a change in conditions pursuant to 20 C.F.R. §725.310, and is further sufficient to establish entitlement based on the irrebuttable presumption of total disability due to pneumoconiosis pursuant to 20 C.F.R. §418.418 when all the evidence is weighed together on the merits.[5] *See Stanley*, 194 F.3d at 491, 22 BLR at 2-1; *Jessee v. Director, OWCP*, 5 F.3d 723, 725, 18 BLR 2-26, 2-28 (4th Cir. 1993).

Accordingly, the administrative law judge's 2004 Decision and Order on Remand awarding benefits is affirmed.

SO ORDERED.

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NANCY S. DOLDER, Chief
Administrative Appeals Judge

_____
ROY P. SMITH
Administrative Appeals Judge

_____
BETTY JEAN HALL
Administrative Appeals Judge

[5] In addition, we affirm as unchallenged the administrative law judge's finding as to onset date. *See Coen*, 7 BLR at 1-33; *Skrack*, 6 BLR at 1-711.