BRB No. 06-0243 BLA

RONALD D. HARRISON	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
SUNSET LAND & COAL COMPANY	)	
	)	DATE ISSUED: 11/30/2006
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 Awarding Benefits of Linda S. Chapman, Administrative Law Judge, United States Department of Labor.

Laura Metcoff Klaus (Greenberg Traurig LLP), Washington, D.C., for employer.

Barry H. Joyner (Howard M. Radzely, Solicitor of Labor; Allen H. Feldman, 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, SMITH and HALL, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order Awarding Benefits (04-BLA-6815) of Administrative Law Judge Linda S. Chapman rendered on a subsequent 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] *See* 20 C.F.R. §725.309(d). The administrative law judge credited claimant with "at least" twenty-two years of coal mine employment,[2] and found that his subsequent claim was timely filed. Decision and Order at 4. The administrative law judge found that the x-ray evidence developed since the denial of claimant's first claim established the existence of complicated pneumoconiosis, entitling claimant to the irrebuttable presumption of total disability due to pneumoconiosis at Section 411(c)(3) of the Act. *See* 30 U.S.C. §921(c)(3), as implemented by 20 C.F.R. §718.304. She therefore determined that claimant established a change in an applicable condition of entitlement, as required by 20 C.F.R. §725.309(d). The administrative law judge further found that all of the evidence of record established that claimant is entitled to benefits. Accordingly, the administrative law judge awarded benefits.[3]

On appeal, employer contends that the administrative law judge erred in finding that claimant's subsequent claim was timely filed. Employer argues further that the administrative law judge erred in her analysis of the conflicting medical evidence regarding the existence of complicated pneumoconiosis. Specifically, employer contends that the administrative law judge shifted the burden to employer to disprove the presence of complicated pneumoconiosis once claimant presented x-ray readings supportive of a finding of complicated pneumoconiosis. Additionally, employer alleges that the administrative law judge did not properly weigh relevant CT-scan readings. Claimant has not responded to employer's appeal. The Director, Office of Workers' Compensation Programs, has filed a limited response urging affirmance of the finding that claimant's subsequent claim was timely filed.

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[1] Claimant's first claim for benefits, filed on April 10, 1997, was denied on July 15, 1997, because claimant did not establish that he was totally disabled by a respiratory or pulmonary impairment. Director's Exhibit 1. Claimant filed this claim on January 17, 2002. Director's Exhibit 3.

[2] The record indicates that claimant's last coal mine employment occurred in Virginia. Hearing Tr. at 36. Accordingly, this case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989)(*en banc*).

[3] Subsequently, the administrative law judge granted a motion for reconsideration filed by the Director, Office of Workers' Compensation Programs, and modified her finding as to the onset date of claimant's entitlement to benefits. Order Granting Motion for Reconsideration, Nov. 22, 2005.

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).

Employer contends that the administrative law judge erred in finding that this subsequent claim constitutes a timely claim for benefits. Section 932 of the Act provides that "[a]ny claim for benefits by a miner . . . shall be filed within three years after whichever of the following occurs later--(1) a medical determination of total disability due to pneumoconiosis; or (2) March 1, 1978." 30 U.S.C. §932(f). Under the implementing regulation, "[t]here shall be a rebuttable presumption that every claim for benefits is timely filed." 20 C.F.R. §725.308(c).

The administrative law judge found that there was no evidence to rebut the timeliness presumption. Decision and Order at 4. Employer alleges error in this finding because claimant testified at the hearing that he left the coal mines in 1992 because "Dr. Patel told me if I didn't quit the mines, that I wasn't going to be around too long. He said my lungs and my heart was getting bad. So he told me to quit, so I quit working." Hearing Tr. at 37. Employer's argument lacks merit. The three-year statute of limitations is triggered by "a medical determination of total disability due to pneumoconiosis which has been communicated to the miner . . . ." 20 C.F.R. §725.308(a). Claimant did not testify that Dr. Patel told him that he was totally disabled due to pneumoconiosis. According to claimant, Dr. Patel merely advised him that he should leave coal mining because of heart and lung problems. Consequently, substantial evidence supports the administrative law judge's finding that nothing in the record "indicate[d] that the Claimant was diagnosed with a total disability due to pneumoconiosis at any time before he filed his application on April 10, 1997." Decision and Order at 4.

Moreover, even assuming *arguendo* that Dr. Patel diagnosed claimant as totally disabled due to pneumoconiosis as of 1992, "a medical determination later deemed to be a misdiagnosis . . . by virtue of a superseding denial of benefits cannot trigger the statute of limitations for subsequent claims." *Consolidation Coal Co. v. Williams*, 453 F.3d 609, 618, 23 BLR 2-345, 2-365 (4th Cir. 2006). In light of the denial of claimant's first claim on July 15, 1997, Dr. Patel's 1992 diagnosis must be treated as "a misdiagnosis" that "had no effect on the statute of limitations for [claimant's] second claim." *Williams*, 453 F.3d at 616, 23 BLR at 2-361. We therefore affirm the administrative law judge's finding that claimant's subsequent claim was timely, and we turn to the administrative law judge's analysis of the medical evidence.

To be entitled to benefits under the Act, claimant must demonstrate by a preponderance of the evidence that he is totally disabled due to pneumoconiosis arising out of coal mine employment. 30 U.S.C. §901; 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure to establish any one of these elements precludes entitlement. *Anderson v. Valley Camp of Utah, Inc*., 12 BLR 1-111, 1-112 (1989).

Where 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(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 that he was totally disabled by a respiratory or pulmonary impairment. Director's Exhibit 1. Consequently, claimant had to submit new evidence establishing that he is totally disabled. 20 C.F.R. §725.309(d)(2),(3); *see also Lisa Lee Mines v. Director, OWCP [Rutter]*, 86 F.3d 1358, 20 BLR 2-227 (4th Cir. 1996)(*en banc*)(holding under former provision that claimant must establish at least one element of entitlement that was previously adjudicated against him). The administrative law judge found that the new evidence developed with the subsequent claim established invocation of the irrebuttable presumption that claimant is totally disabled due to pneumoconiosis.

Section 411(c)(3) of the Act, implemented by 20 C.F.R. §718.304, 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 or autopsy, 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 introduction of legally sufficient evidence of complicated pneumoconiosis does not automatically qualify a claimant for the irrebuttable presumption found at 20 C.F.R. §718.304. In determining whether claimant has established invocation of the irrebuttable presumption of total disability due to pneumoconiosis pursuant to Section 718.304, the administrative law judge must weigh together all of the evidence relevant to the presence or absence of complicated pneumoconiosis. *Lester v. Director, OWCP*, 993 F.2d 1143, 1145-46, 17 BLR 2-114, 2-117-18 (4th Cir. 1993); *Melnick v. Consolidation Coal Co.*, 16 BLR 1-31, 1-33-34 (1991)(*en banc*).

Pursuant to Section 718.304(a), employer contends that the administrative law judge did not reconcile the conflicting x-ray evidence. Specifically, employer alleges that the administrative law judge misapplied *Eastern Associated Coal Corp. v. Director, OWCP* [*Scarbro*], 220 F.3d 250, 22 BLR 2-93 (4th Cir. 2000), to shift the burden to

employer to disprove the existence of complicated pneumoconiosis upon claimant's introduction of three x-ray readings classified for the presence of large opacities. Employer's contention has merit.

There were eleven readings of six new x-rays. Dr. Baker, a B reader, interpreted the March 14, 2002 x-ray as showing abnormalities consistent with pneumoconiosis and classified the film 1/1 for simple pneumoconiosis and Category A for complicated pneumoconiosis. Director's Exhibit 11. Dr. Scott, who is a Board-certified radiologist and B reader, interpreted the same x-ray as showing no abnormalities consistent with pneumoconiosis, and concluded that the large mass in the apex of claimant's right lung was "granulomatous versus cancer." Employer's Exhibit 5. Dr. Cappiello, a Board-certified radiologist and B reader, classified the July 23, 2002 x-ray as 2/1 for simple pneumoconiosis and Category A for complicated pneumoconiosis. Director's Exhibit 47. Dr. Scatarige, who is also a Board-certified radiologist and B reader, classified the same x-ray as negative for any abnormalities consistent with pneumoconiosis. Employer's Exhibit 9. Dr. Wheeler, a Board-certified radiologist and B reader, interpreted the September 4, 2002 x-ray as 0/1 for simple pneumoconiosis and as negative for large opacities. Employer's Exhibit 2. Dr. Wheeler concluded that the large mass in the right apex was compatible with granuloma, scar, or tumor, and he recommended a CT-scan. *Id*. Dr. Versoza, whose radiological credentials are not of record, reported that the September 17, 2002 x-ray showed "COPD" with diffuse nodularities in both lungs, and "conglomerate nodules" in the upper lobes "suggestive of coal workers pneumoconiosis." Director's Exhibit 43. Dr. Fino, a B reader, classified the same x-ray as negative for pneumoconiosis. Employer's Exhibit 8. Dr. Versoza reported that the March 31, 2003 x-ray showed COPD and "fine nodularities with larger nodules at the upper lobe . . . most compatible with coal workers pneumoconiosis." Director's Exhibit 43. Dr. Scatarige classified the same x-ray as 1/0 for simple pneumoconiosis and negative for any large opacities. Employer's Exhibit 13. Dr. Scatarige concluded that a 2.5 centimeter mass resembled "TB" rather than pneumoconiosis. *Id*. Dr. DePonte, a Board-certified radiologist and B reader, classified the June 5, 2004 x-ray as 1/1 for simple pneumoconiosis and Category A for complicated pneumoconiosis. Claimant's Exhibit 1. Dr. Wheeler classified the same x-ray as 0/1 for simple pneumoconiosis and negative for large opacities. Employer's Exhibit 13. Dr. Wheeler specified that the "mass in [the] right apex is not a large opacity," and he concluded that it was compatible with "conglomerate TB more likely than histoplasmosis or cancer." *Id*.

The administrative law judge summarized the x-ray readings, but did not reconcile the conflicting readings. Instead, the administrative law judge stated that claimant had presented "three x-ray interpretations clearly satisfying the requirements of prong (A)," and that, "[t]hus, under *Scarbro*, that x-ray evidence . . . can lose force only if the other x-ray evidence . . . *affirmatively* shows that the opacities are not there or are not what they seem to be." Decision and Order at 15 (emphasis in original). The administrative law

judge found that employer did not present affirmative evidence to show that the large opacities were not there or were not what they seemed to be, because its x-ray readers acknowledged a large mass but speculated that it was something other than pneumoconiosis. Decision and Order at 15-18. The administrative law judge found that employer's physicians were "willing to exclude pneumoconiosis as a cause for the mass, [but] are not willing to make an affirmative diagnosis on the etiology of the mass." Decision and Order at 17. The administrative law judge therefore found that "Claimant's x-ray evidence does not lose force," and invoked the irrebuttable presumption. Decision and Order at 20.

The administrative law judge applied an incorrect standard in analyzing the x-ray readings. In *Scarbro*, the Fourth Circuit court held that where the x-ray evidence "vividly displays" the presence of large opacities, other medical evidence under prongs (B) or (C) of 30 U.S.C. §923(c) can undermine the positive x-rays only by affirmatively showing that the opacities are not there or are not what they seem to be. *Scarbro*, 220 F.3d at 256, 22 BLR at 2-101. The administrative law judge in this case interpreted this holding as providing that if a claimant submits any x-ray evidence supportive of a finding of complicated pneumoconiosis, the burden shifts to the party opposing entitlement to affirmatively establish the absence of large opacities. The administrative law judge's analysis was incorrect because in *Scarbro* the issue was whether evidence under other prongs of 30 U.S.C. §923(c) undermined x-rays that clearly demonstrated large opacities, whereas here the issue was whether the conflicting x-ray readings supported a finding of large opacities.

In this context, the administrative law judge's requirement that employer affirmatively establish that the large opacities identified by Drs. Baker, Cappiello, and DePonte were not there, or were not what they seemed to be, effectively required employer to disprove the presence of large opacities once claimant submitted three positive x-ray readings. However, "claimant retains the burden of proving the existence of" complicated pneumoconiosis. *Lester*, 993 F.3d at 1146, 17 BLR at 2-118. Therefore, we must vacate the administrative law judge's findings at 20 C.F.R. §§718.304(a), 725.309(d), and remand this case for her to weigh all readings of the six x-rays, with the burden on claimant, and determine whether the x-rays establish the presence of large opacities. *See Adkins v. Director, OWCP*, 958 F.2d 49, 16 BLR 2-61 (4th Cir. 1992).

Pursuant to 20 C.F.R. §718.304(c), employer contends that the administrative law judge did not properly weigh the CT scan evidence. This contention has merit. The administrative law judge found that the CT scan readings[4] were not affirmative evidence

[4] There were two CT scans. Dr. Versoza read the September 17, 2002 and March 31, 2003 CT scans as showing nodules, and a 2-3 cm. "conglomerate" mass in the right upper lobe compatible with coal workers' pneumoconiosis. Director's Exhibit 43. Dr.

that the large opacities noted by Drs. Baker, Cappiello, and DePonte were not there or were not what they seemed to be. Decision and Order at 18. We have vacated the administrative law judge's finding that the x-rays demonstrated large opacities. Consequently, we also vacate the administrative law judge's finding as to the CT scan readings pursuant to 20 C.F.R. §718.304(c).

On remand, the administrative law judge should consider whether the weight of the x-ray evidence at 20 C.F.R. §718.304(a), and the weight of the CT scan and medical opinion evidence at 20 C.F.R. §718.304(c), support a finding of the existence of complicated pneumoconiosis, and should then weigh together all of the relevant evidence to determine whether the existence of complicated pneumoconiosis is established. *See Lester*, 993 F.2d at 1145-46, 17 BLR at 2-117-18; *Gollie v. Elkay Mining Co.*, 22 BLR 1-306, 1-311 (2003); *Melnick*, 16 BLR at 1-33-34.

Wheeler read the September 17, 2002 CT scan as showing a 2.8 cm. mass in the right apex compatible with conglomerate tuberculosis or histoplasmosis. Employer's Exhibit 11 at 39-42. Dr. Scott read the March 31, 2003 CT scan as showing a 2.5 cm. mass in the right apex that was "probably granulomatous and due to TB," but he could not rule out cancer. Employer's Exhibit 13.

Accordingly, the administrative law judge's Decision and Order Awarding Benefits is affirmed in part and vacated in part, and this case is remanded to the administrative law judge for further consideration consistent with this opinion.

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