BRB No. 11-0308 BLA

JOE SLADE	)	
	)	
Claimant	)	
	)	
v.	)	
	)	
SOUTHERN APPALACHIAN COAL COMPANY	)	DATE ISSUED: 11/22/2011
	)	
	)	
Employer-Respondent	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
	)	
Petitioner	)	DECISION and ORDER

Appeal of the Decision and Order Denying Benefits of Ralph A. Romano, Administrative Law Judge, United States Department of Labor.

Sarah M. Hurley (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:

The Director, Office of Workers' Compensation Programs (the Director), appeals the Decision and Order Denying Benefits (2006-BLA-06174) of Administrative Law Judge Ralph A. Romano on a subsequent claim[1] filed on October 25, 2005, pursuant to

[1] Claimant's prior claim was finally denied on April 30, 1991, when the Board affimed the administrative law judge's denial of benefits because claimant had not established a totally disabling respiratory impairment. *Slade v. Southern Appalachian Coal Co.*, BRB No. 88-1656 BLA (Apr. 30, 1991) (unpub.); Director's Exhibit 2.

the provisions of 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). The administrative law judge credited claimant with 27.76 years of coal mine employment, and found that 27.5 of those years were spent in underground coal mine employment. Considering the new evidence relevant to the issue of total disability pursuant to 20 C.F.R. §718.204(b), the element of entitlement previously adjudicated against claimant, the administrative law judge found that the evidence failed to establish a totally disabling respiratory impairment thereunder, and failed, therefore, to establish a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309(d). Because a totally disabling respiratory impairment was not established pursuant to Section 718.204(b), the administrative law judge also found that the Section 411(c) presumption of totally disabling pneumoconiosis was not invoked. *See* 30 U.S.C. §921(c)(4). Accordingly, the administrative law judge denied benefits.

On appeal the Director contends that the administrative law judge erred in failing to address the issue of complicated pneumoconiosis, as there was evidence of the disease in the record. The Director contends, therefore, that the administrative law judge's decision denying benefits must be vacated and the case remanded for consideration of whether claimant established the existence of complicated pneumoconiosis and was, therefore, entitled to the irrebuttable presumption of totally disabling pneumoconiosis pursuant to Section 411(c)(3), 30 U.S.C. §921(c)(3), as implemented by 20 C.F.R. §718.304. Neither employer nor claimant[2] has responded to this appeal.[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

[2] The Director, Office of Workers' Compensation Programs (the Director), notes that claimant died on October 7, 2010, and that his wife is also deceased. The Director notes, however, that claimant's daughter has qualified as the administratrix of her father's estate and is eligible to pursue his claim on behalf of his estate. *See* 20 C.F.R. §725.360(b).

[3] The administrative law judge's findings that claimant failed to establish a totally disabling respiratory impairment pursuant to 20 C.F.R. §718.204(b) and failed, therefore, to establish invocation of the Section 411(c) presumption of totally disabling pneumoconiosis are affirmed, as unchallenged on appeal. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

[4] The record indicates that claimant's coal mine employment was in West Virginia. Director's Exhibit 3. Accordingly, this case arises within the jurisdiction of the

U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

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 (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). In this case, the administrative law judge noted that claimant's prior claim was denied for failure to establish total disability. Consequently, in order to obtain review of the merits of the current claim, claimant had to submit new evidence establishing total disability. 20 C.F.R. §725.309(d)(2), (3).

Section 411(c)(3) of the Act, 30 U.S.C. §921(c)(3), as implemented by 20 C.F.R. §718.304, provides, in pertinent part, an irrebuttable presumption of totally disabling pneumoconiosis:

> If a miner is suffering or suffered from a chronic dust disease of the lung which (A) when diagnosed by chest roentgenogram, yields one or more large opacities (greater than one centimeter in diameter) and would be classified in category A, B, or C in the International Classification of Radiographs of the Pneumoconioses by the International Labor Organization, (B) when diagnosed by biopsy or autopsy, yields massive lesions in the lung, or (C) when diagnosis is made by other means, would be a condition which could reasonably be expected to yield results described in clause (A) or (B) if diagnosis had been made in the manner prescribed in clause (A) or (B).

30 U.S.C. §921(c)(3). A determination of whether complicated pneumoconiosis has been demonstrated is, however, a finding of fact and the administrative law judge must consider and weigh all relevant evidence before making a finding on the issue. *See Gray*

United States Court of Appeals for the Fourth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989)(*en banc*).

v. SLC Coal Co., 176 F.3d 382, 21 BLR 2-615 (6th Cir. 1999); *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*).

As the Director contends, the record in this case contains evidence relevant to the issue of complicated pneumoconiosis, which the administrative law judge did not address. Specifically, the Director points to the opinion of Dr. Rasmussen, who diagnosed complicated pneumoconiosis based on the results of the January 30, 2006 x-ray, which he interpreted as showing both large opacities, category A, as well as small opacities. Director's Exhibit 10; Employer's Exhibit 8 at 6. The Director also notes that there are four additional x-ray readings, which contain diagnoses of category A opacities. Claimant's Exhibits 1, 2, 3, 5. Because the administrative law judge failed to address this evidence, his decision denying benefits is vacated. The case is, therefore, remanded for the administrative law judge to address the evidence relevant to the issue of complicated pneumoconiosis, including evidence that weighs against such a finding. *See Gray*, 176 F.3d at 389, 21 BLR at 2-629; *Director, OWCP v. Rowe*, 710 F.2d 251, 5 BLR 2-99 (6th Cir. 1983); *Melnick*, 16 BLR at 1-34; *see also Eastern Associated Coal Corp. v. Director, OWCP* [*Scarbro*], 220 F.3d 250, 22 BLR 2-93 (4th Cir. 2000); *Lester*, 993 F.2d at 1145-46, 17 BLR at 2-117. Further, if the administrative law judge finds that the evidence establishes the existence of complicated pneumoconiosis at Section 718.304, he must also determine whether the complicated pneumoconiosis arose out of coal mine employment pursuant to 20 C.F.R. §718.203(b), in order to find the Section 411(c)(3) presumption invoked. *See* 30 U.S.C. §921(c)(3).

Accordingly, the administrative law judge's Decision and Order Denying Benefits is affirmed in part, vacated in part, and the 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