BRB No. 12-0104 BLA

JEFFREY J. COLEMAN	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
PARAMONT COAL COMPANY of VIRGINIA, LLC	)	
	)	
and	)	
	)	
CHARTIS PROPERTY CASUALTY INSURANCE COMPANY	)	DATE ISSUED: 11/29/2012
	)	
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 of Linda S. Chapman, Administrative Law Judge, United States Department of Labor.

Joseph E. Wolfe (Wolfe Williams Rutherford & Reynolds), Norton, Virginia, for claimant.

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

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

PER CURIAM:

Employer/carrier (employer) appeals the Decision and Order Awarding Benefits (2011-BLA-5054) of Administrative Law Judge Linda S. Chapman (the administrative

law judge) on a subsequent claim filed on July 9, 2009, pursuant to the provisions of the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (Supp. 2011)(the Act). The administrative law judge found that 33.34 years of coal mine employment were established. The administrative law judge also found that complicated pneumoconiosis arising out of coal mine employment was established pursuant to 20 C.F.R. §§718.304; 718.203(b). The administrative law judge, therefore, found claimant entitled to invocation of the irrebuttable presumption of totally disabling pneumoconiosis at Section 411(c)(3) of the Act, 30 U.S.C. §921(c)(3). Accordingly, the administrative law judge awarded benefits on the claim.

On appeal, employer contends that the administrative law judge erred in finding the existence of complicated pneumoconiosis established pursuant to Section 718.304 and, therefore, erred in finding claimant entitled to the Section 411(c)(3) irrebuttable presumption of totally disabling pneumoconiosis.[1] Claimant responds, urging affirmance of the administrative law judge's award of benefits. The Director, Office of Workers' Compensation Programs, has declined to file a response brief in this appeal.

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.[2] 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).

In order to establish entitlement to benefits in a living miner's claim pursuant to 20 C.F.R. Part 718, claimant must prove that he suffers from pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, that he is totally disabled and that his disability is due to pneumoconiosis. *See* 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure to establish any one of these elements precludes a finding of entitlement. *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(en banc).

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

[1] The administrative law judge's length of coal mine employment finding is affirmed, as unchallenged on appeal. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

[2] 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.

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, claimant's prior claim was denied on February 12, 1999 because the evidence did not establish any of the elements of entitlement. Director's Exhibit 1. Therefore, claimant had to submit new evidence establishing at least one element of entitlement in order to have the administrative law judge review the subsequent claim on the merits. The administrative law judge found that claimant demonstrated a change in an applicable condition of entitlement by establishing that he suffers from complicated pneumoconiosis.

Section 411(c)(3) of the Act, as implemented by 20 C.F.R. §718.304, provides 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 that 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, however, automatically qualify a claimant for the irrebuttable presumption found at 20 C.F.R. §718.304. Rather, the evidence must establish that claimant has a "chronic dust disease of the lung," commonly known as complicated pneumoconiosis. To make such a determination, the administrative law judge must examine all the evidence on the issue, *i.e.*, evidence of simple and complicated pneumoconiosis, as well as evidence that pneumoconiosis is not present, resolve any conflict in the evidence, and make findings of fact. *Eastern Assoc. Coal Corp. v. Director, OWCP* [*Scarbro*], 220 F.3d 250, 22 BLR 2-93 (4th Cir. 2000); *Lester v. Director, OWCP*, 993 F.2d 1143, 17 BLR 2-114 (4th Cir. 1993); *Gollie v. Elkay Mining Corp.*, 22 BLR 1-306, 1-311 (2003); *Melnick v. Consolidation Coal Co.*, 16 BLR 1-31, 1-33-34 (1991)(en banc).

Pursuant to 20 C.F.R. §718.304(a), the administrative law judge found that the newly submitted x-ray of September 16, 2009 was read by Drs. Alexander and DePonte, dually-qualified Board-certified radiologists and B readers, as positive for both simple pneumoconiosis and complicated pneumoconiosis, Category A. Director's Exhibits 13, 30. The administrative law judge noted that the x-ray was read as negative for pneumoconiosis by Dr. Wiot, an equally-qualified radiologist. Director's Exhibit 26. However, the administrative law judge found that while Dr. Scott, an equally-qualified radiologist, read the same x-ray as negative for both simple pneumoconiosis and complicated pneumoconiosis, he advised that a follow-up review of the enlarging mass in the upper-right lung be conducted. Employer's Exhibit 1. Regarding the December 7, 2009 x-ray, the administrative law judge found that Dr. DePonte read the x-ray as

positive for both simple pneumoconiosis and complicated pneumoconiosis, Category A, Director's Exhibit 25, while Dr. Wiot read the x-ray as negative. Director's Exhibit 29. The administrative law judge further concluded that Drs. Alexander and DePonte attributed the complicated pneumoconiosis to coal mine employment and that there was no credible medical evidence of record indicating that "the large masses in [claimant's] lungs are due to a process other than pneumoconiosis." Decision and Order at 13; 20 C.F.R. §718.304(a).[3] Consequently, the administrative law judge found that the existence of complicated pneumoconiosis was established pursuant to Section 718.304 overall.

The administrative law judge also weighed the new evidence with the evidence in claimant's prior claim, including x-rays and a medical opinion. After crediting the more recent evidence, inasmuch as pneumoconiosis is a progressive disease, the administrative law judge determined that the existence of complicated pneumoconiosis was established pursuant to Section 718.304 overall. The administrative law judge concluded, therefore, that claimant was entitled to invocation of the Section 411(c)(3) irrebuttable presumption of totally disabling pneumoconiosis.

Employer contends that the administrative law judge erred in finding that the x-ray evidence established complicated pneumoconiosis on the basis of the Category A classifications of Drs. Alexander and DePonte, without considering the fact that other x-ray readings did not identify Category A opacities. Additionally, employer contends that the administrative law judge erred in rejecting evidence that showed that the large mass seen on x-ray was not due to complicated pneumoconiosis, but was due to another disease process.

Contrary to employer's argument, however, the administrative law judge properly found complicated pneumoconiosis established pursuant to Section 718.304(a), based on the x-ray readings of Drs. Alexander and DePonte, who classified the opacities seen as Category A. The administrative law judge permissibly found that the other x-ray readings,[4] which either did not diagnose a large opacity, identify the size of the opacities seen, or address the existence of the large opacity observed by Drs. Alexander and

[3] The record does not contain evidence that could establish complicated pneumoconiosis pursuant to 20 C.F.R. §§718.304(b), (c).

[4] These readings consisted of the readings of the September 16, 2009 and December 7, 2009 x-rays and the readings of other x-rays that were deemed to be of less than optimal quality; that identified nodules, but did not refer to their size or cause; that identified a large mass that might be Category A; and that were classified for pneumoconiosis as either 0/1 or 1/1. Director's Exhibits 29, 31; Employer's Exhibits 2, 6.

DePonte, were insufficient to overcome the Category A classifications of Drs. Alexander and DePonte. *See Scarbro*, 220 F.3d at 256, 22 BLR at 2-101; *Piney Mountain Coal Co. v. Mays*, 176 F.3d 753, 756, 21 BLR 2-587, 591 (4th Cir. 1999); *Staton v. Norfolk & Western Ry. Co.*, 65 F.3d 55, 19 BLR 2-271 (6th Cir. 1995).

Further, contrary to employer's argument, the administrative law judge properly found that the evidence established that the large masses seen on x-ray were due to complicated pneumoconiosis and not another disease process. Specifically, the administrative law judge properly rejected the opinions of Drs. Castle and Fino, who suggested a possible link between the large opacity seen on x-ray and sarcoidosis or healed granulomatous disease, as equivocal.[5] *See Stanley v. Eastern Assoc. Coal Corp.*, 6 BLR 1-1157 (1984). The administrative law judge, therefore, found that the opinions of Drs. Castle and Fino were insufficient to establish that the large opacities were not due to coal mine employment. The administrative law judge also found that the opinions of Drs. Castle and Fino, as to the "possible" cause of the large opacity, were not credible as they were unsupported by any evidence in the record. *See Westmoreland Coal Co. v. Cox*, 602 F.3d 276, 24 BLR 2-269 (4th Cir. 2010); *see also Jericol Mining, Inc. v. Napier*, 301 F.3d 703, 22 BLR 2-537 (6th Cir. 2002); *Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 533, 21 BLR 2-323, 2-335 (4th Cir. 1998); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989)(en banc); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19, 1-22 (1987).

In contrast, the administrative law judge properly credited the findings of Drs. DePonte and Alexander, attributing claimant's Category A opacity to coal mine employment, as she found that their findings were supported by the evidence of record. *See Clark*, 12 BLR at 1-155. Thus, the administrative law judge properly found that claimant established the existence of complicated pneumoconiosis pursuant to 20 C.F.R. §718.304.

We, therefore, affirm the administrative law judge's finding that claimant established the existence of complicated pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.304, 718.203(b), and that claimant is entitled to invocation of the Section 411(c)(3) irrebuttable presumption of totally disabling pneumoconiosis.

[5] Specifically, Dr. Castle opined that laboratory testing conducted on claimant, while negative for histoplasmosis, suggested "possible" sarcoidosis and the few non-specific nodules seen on claimant's x-ray were "most likely" due to an infectious disease that had healed. *See* Employer's Exhibits 3, 4 and 6. Dr. Fino stated that claimant's x-ray did not show complicated pneumoconiosis and that the Category A opacities seen by other physicians "could" be due to sarcoidosis. Employer's Exhibits 2, 5.

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

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