BRB No. 05-0523 BLA

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| BILLY GLENN DILLON | ) | |
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| Claimant-Petitioner | ) | |
| | ) | |
| v. | ) | |
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| BIG HILL COAL COMPANY, INCORPORATED | ) | DATE ISSUED: 10/19/2005 |
| | ) | |
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| Employer-Respondent | ) | |
| | ) | |
| 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 -- Denying Benefits of Richard A. Morgan, Administrative Law Judge, United States Department of Labor.

Dennis James Keenan (Hinkle & Keenan PSC), South Williamson, Kentucky.

Francesca L. Maggard (Lewis & Lewis Law Office), Hazard, Kentucky, for employer.

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

PER CURIAM:

Claimant appeals the Decision and Order on Remand -- Denying Benefits (01-BLA-1143) of Administrative Law Judge Richard A. Morgan 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). This case is on appeal to the Board for the second time.

In his initial Decision and Order, the administrative law judge adjudicated this claim pursuant to 20 C.F.R. Part 718 and, after crediting the previous administrative law judge's findings that claimant worked in qualifying coal mine employment for sixteen years and

established the existence of pneumoconiosis arising out of coal mine employment,[1] found that claimant failed to establish total respiratory disability pursuant to 20 C.F.R. §718.204(b). In addition, the administrative law judge found that the evidence of record, namely the CT scan report of Dr. Narra, was sufficient to establish invocation of the irrebuttable presumption of total disability due to pneumoconiosis pursuant to 30 U.S.C. §921(c)(3), as implemented by 20 C.F.R. §718.304, based on a finding that claimant suffered from complicated pneumoconiosis, and that, therefore, claimant established a material change in conditions pursuant to 20 C.F.R. §725.309 (2000). Accordingly, the administrative law judge awarded benefits.

Upon review of employer's timely appeal, the Board affirmed the administrative law judge's finding that the x-ray evidence neither precluded nor established the presence of complicated pneumoconiosis under Section 718.304(a) and his findings with respect to the opinions of Drs. Ranavaya, Dahhan and Wheeler, but vacated his analysis of the CT scan opinion of Dr. Narra in conjunction with the x-ray evidence, and therefore, vacated his determination that the presence of complicated pneumoconiosis was established under Section 718.304. The Board instructed the administrative law judge to determine on remand whether the CT scan indicated a condition that would have produced an opacity greater than one centimeter when viewed on x-ray. The Board further instructed that if, on remand, the administrative law judge found the CT scan evidence sufficient to establish the presence of complicated pneumoconiosis, and thus, a material change in conditions pursuant to Section 725.309 (2000), he must then evaluate and weigh that evidence with the other relevant evidence of record as a whole, including that submitted with the prior claim, to determine if claimant is entitled to benefits.[2] *Dillon Big Coal Co., Inc.*, BRB No. 03-0691 BLA (Jun. 3, 2004) (unpub.).

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[1] Claimant, Billy Glenn Dillon, filed his first application for benefits on October 13, 1995; this claim was finally denied by Administrative Law Judge Gerald M. Tierney who found that claimant established the existence of simple pneumoconiosis arising out of coal mine employment but failed to establish total respiratory disability. Director's Exhibits 29-1, 29-39. Claimant's appeal of this denial was untimely filed and dismissed by the Board. *Dillon Big Coal Co., Inc.*, BRB No. 99-1013 BLA (Jul. 6, 1999) (unpub.) (Order). Thereafter, claimant filed a duplicate claim for benefits on October 12, 2000, which is pending on appeal. Director's Exhibit 1.

[2] The Board affirmed the administrative law judge's determination with respect to length of coal mine employment as this determination was unchallenged on appeal. *Dillon Big Coal Co., Inc.*, BRB No. 03-0691 BLA, *slip op*. at 2 n.3 (Jun. 3, 2004) (unpub.).

Pursuant to the Board's remand instructions, the administrative law judge reversed his prior Decision and Order awarding benefits on the basis of Dr. Narra's review of the CT scan revealing large opacities measuring three to ten millimeters because the size of these identified opacities did not reasonably yield the results described in Section 718.304(a) or (b), and claimant failed to establish the presence of complicated pneumoconiosis pursuant to Section 718.304(c). Further, the administrative law judge weighed all the newly submitted evidence relevant to invocation of the irrebuttable presumption together and concluded that claimant failed to establish the existence of complicated pneumoconiosis by a preponderance of the evidence pursuant to Section 718.304. Accordingly, benefits were denied.

On appeal, claimant argues that the administrative law judge erred in analyzing the medical opinion of Dr. Narra, whose CT scan opinion diagnosing the existence of complicated pneumoconiosis is uncontroverted evidence of the disease. Employer responds, urging affirmance of the denial. The Director, Office of Workers' Compensation Programs (the Director), as party-in-interest, has filed a letter indicating his intention not to participate in this appeal.

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).

After consideration of the administrative law judge's Decision and Order on Remand, claimant's arguments, and the evidence of record, we conclude that the administrative law judge's Decision and Order on Remand is supported by substantial evidence and contains no reversible error because the administrative law judge properly found that claimant failed to establish that he suffers from complicated pneumoconiosis, and hence, failed to establish invocation of the irrebuttable presumption of total disability due to pneumoconiosis pursuant to Section 718.304.

In challenging the administrative law judge's analysis under Section 718.304(c), claimant argues that the administrative law judge erred in failing to find Dr. Narra's CT scan report sufficient to establish the presence of complicated pneumoconiosis because Dr. Narra, a B-reader and Board-eligible radiologist, was the only physician who interpreted the CT scan taken on July 31, 2001 and he rendered an uncontroverted finding of abnormalities secondary to complicated pneumoconiosis. Claimant further asserts that Dr. Narra's diagnosis of complicated pneumoconiosis, as supported by the x-ray interpretations of Drs. Navani, Gaziano, Gayler, Scott, and Wheeler diagnosing the presence of large opacities, provided credible evidence sufficient to compel a conclusion that claimant suffered from complicated pneumoconiosis. We disagree.

In determining whether a miner is suffering or suffered from a chronic dust disease of the lung commonly known as complicated pneumoconiosis at Section 718.304, the administrative law judge must first evaluate the evidence in each category, and then weigh together the categories at Section 718.304(a), (b), and (c), prior to finding the existence of complicated pneumoconiosis established. 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); *Melnick v. Consolidation Coal Co.*, 16 BLR 1-31, 1-33 (1991) (*en banc*). 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. *Eastern Associated Coal Corp. v. Director, OWCP* [*Scarbro*], 220 F.3d 250, 256, 22 BLR 2-93, 2-101 (4th Cir. 2000), *citing Lester v. Director, OWCP*, 993 F.2d 1143, 1145, 17 BLR 2-114, 2-117 (4th Cir. 1993); *see Double B Mining, Inc. v. Blankenship*, 177 F.3d 240, 243-244, 22 BLR 2-554, 2-561-562 (4th Cir. 1999). Further, it is well established 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. *Blankenship*, 177 F.3d at 243-244, 22 BLR at 2-561-562. Hence, the administrative law judge must determine whether "the evidence as a whole indicates a condition of such severity that it would produce opacities greater than one centimeter in diameter on an x-ray." *Scarbro*, 220 F.3d at 256, 22 BLR at 2-101.

In accordance with the Board's remand instructions to reassess the opinion of Dr. Narra, the administrative law judge determined that Dr. Narra, in his detailed summary of the CT scan findings, reported that the largest opacities measured three to ten millimeters, or the equivalent of 0.3 to 1.0 centimeters. Director's Exhibit 28. The administrative law judge concluded that, absent any medical or scientific evidence demonstrating that opacities appear smaller on CT scans than on standard chest x-rays, the opacities observed by Dr. Narra failed to constitute an underlying condition that would have yielded the results described in Section 718.304(a), *i.e.*, an opacity greater than one centimeter on x-ray, or in Section 718.304(b), massive lesions in the lung as when diagnosed by biopsy. This was rational. *See Scarbro*, 220 F.3d at 256, 22 BLR at 2-101; *Braenovich v. Cannelton Industries, Inc./Cypress Amax*, 22 BLR 1-236, 1-245 (2003) (Gabauer, J., concurring); Decision and Order on Remand at 4. Because the administrative law judge properly determined that Dr. Narra's CT scan opinion failed to constitute an underlying condition that would have produced an opacity greater than one centimeter when viewed on x-ray, and as such, affirmatively failed to demonstrate the existence of complicated pneumoconiosis, we affirm the administrative law judge's Section 718.304(c) determination. *See* 20 C.F.R. §718.304(c); *Blankenship*, 177 F.3d at 243-244, 22 BLR at 2-561-562; *Lester*, 993 F.2d at 1143, 17 BLR at 2-114; *Braenovich*, 22 BLR at 1-245. Likewise, we affirm the administrative law judge's determination that the newly submitted evidence relevant to invocation of the irrebuttable presumption, *i.e.*, the

inconclusive x-ray evidence and reasoned medical opinion evidence, was insufficient to establish the presence of complicated pneumoconiosis after weighing all the relevant evidence together under Section 718.304 inasmuch as this determination is rational and supported by substantial evidence. Furthermore, because claimant has not otherwise challenged the administrative law judge's discrediting of the opinion of Dr. Narra, we affirm the administrative law judge's findings that claimant failed to establish the existence of complicated pneumoconiosis pursuant to Section 718.304, and thus, a material change in conditions pursuant to Section 725.309 (2000).

Based on the foregoing, therefore, we affirm the administrative law judge's determination that the evidence of record is insufficient to establish invocation of the irrebuttable presumption of total disability due to pneumoconiosis pursuant to Section 718.304 and, that entitlement to benefits is precluded. *See* 20 C.F.R. §725.309(d) (2000); *Sharondale Corp. v. Ross*, 42 F.3d 993, 19 BLR 2-10 (6th Cir. 1994).

Accordingly, the Decision and Order on Remand -- Denying Benefits of the administrative law judge is affirmed.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge