BRB No. 09-0266 BLA

R.W.F.	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
ITMANN COAL COMPANY	)	DATE ISSUED: 10/21/2009
	)	
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 Awarding Benefits of William S. Colwell, Associate Chief Administrative Law Judge, United States Department of Labor.

Leonard Stayton, Inez, Kentucky, for claimant.

Douglas A. Smoot and William P. Margelis (Jackson Kelly PLLC), Morgantown, West Virginia, for employer.

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

PER CURIAM:

Employer appeals the Decision and Order on Remand Awarding Benefits (04-BLA-5414) of Associate Chief Administrative Law Judge William S. Colwell, rendered on a subsequent claim filed on May 3, 2002, 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 before the Board for the second time. In his prior Decision and Order, the administrative law judge credited claimant with forty years of coal mine employment based on the parties' stipulation, and adjudicated this claim pursuant to the regulations contained in 20 C.F.R. Part 718. The administrative law judge found the newly submitted evidence sufficient to establish the presence of complicated

pneumoconiosis and, thereby, sufficient to establish invocation of the irrebuttable presumption of total disability due to pneumoconiosis pursuant to 20 C.F.R. §718.304. The administrative law judge also found the newly submitted evidence sufficient to establish that the pneumoconiosis arose out of coal mine employment pursuant to 20 C.F.R. §718.203(b). Consequently, the administrative law judge found the newly submitted evidence sufficient to establish a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309, and awarded benefits.

Employer appealed the award of benefits to the Board. Pursuant to employer's appeal, the Board vacated the administrative law judge's award of benefits and remanded the case to the administrative law judge for further proceedings. [*R.W.F.*] *v. Itmann Coal Co.*, BRB No. 06-0421 BLA (Feb. 28, 2007)(unpub.). Initially, the Board affirmed the administrative law judge's exclusion of the x-ray interpretations of Drs. Scott and Scatarige, as their interpretations of the June 16, 2003 x-ray exceeded the evidentiary limitations set forth at 20 C.F.R. §725.414. However, the Board found that the administrative law judge erred in excluding Dr. Wheeler's rereading of the June 26, 2004 x-ray, holding that employer was entitled to submit one rebuttal reading for each affirmative x-ray submitted by claimant, even when both affirmative readings were separate interpretations of the same film. [*R.W.F.*], slip op. at 5. The Board, therefore, vacated the administrative law judge's finding at 20 C.F.R. §728.304(a) and remanded the case for the administrative law judge to admit Dr. Wheeler's x-ray reading and reevaluate the new x-ray evidence pursuant to Section 718.304(a). *Id*. The Board further instructed the administrative law judge to reconsider all of the newly submitted evidence in order to determine whether it established the presence of complicated pneumoconiosis pursuant to Section 718.304(a) and (c).[1] *Id*. With respect to the medical opinion evidence at Section 718.304(c), the Board held that the administrative law judge erred in failing to consider Dr. Hippensteel's opinion that claimant did not have complicated pneumoconiosis because the doctor found that claimant did not have a pulmonary impairment. The Board held that the doctor's opinion was still relevant to the issue of complicated pneumoconiosis. [*R.W.F.*], slip op. at 8. The Board, therefore, instructed the administrative law judge to reconsider the opinion of Dr. Hippensteel in its totality, along with the x-ray evidence, in determining whether the new evidence, as a whole, established complicated pneumoconiosis at Section 718.304. The Board also instructed the administrative law judge that if, on remand, he found the newly submitted evidence sufficient to establish the presence of complicated pneumoconiosis, he must then determine whether the evidence of record established complicated pneumoconiosis at Section 718.304, and whether the pneumoconiosis arose out of coal mine employment, *citing* 20 C.F.R. §§718.203(b) and 718.302. However, the Board noted that if the administrative law judge found the new evidence insufficient to establish complicated pneumoconiosis, he must then determine whether it was sufficient to establish any

[1] The Board noted that there was no biopsy evidence. [*R.W.F.*], slip op. at 7.

element of entitlement at Part 718 and, if reached, whether the evidence as a whole established entitlement at Part 718. [*R.W.F.*], slip op. at 8-9.

On remand, the administrative law judge set forth the Board's remand instructions and reconsidered the relevant evidence, including the reading by Dr. Wheeler of the June 26, 2004 x-ray film and Dr. Hippensteel's medical opinion. Weighing the evidence submitted since the prior denial, the administrative law judge found this evidence sufficient to establish the presence of complicated pneumoconiosis and, thereby, sufficient to establish invocation of the irrebuttable presumption of total disability due to pneumoconiosis pursuant to Section 718.304. Consequently, the administrative law judge found the newly submitted evidence sufficient to establish a change in an applicable condition of entitlement pursuant to Section 725.309. Considering all the evidence, both old and new, the administrative law judge, finding the new evidence to be the most probative, determined that claimant established invocation of the irrebuttable presumption pursuant to Section 718.304 on the merits. The administrative law judge also found the evidence of record sufficient to establish that the pneumoconiosis arose out of coal mine employment pursuant to Section 718.203(b). Accordingly, the administrative law judge again awarded benefits.

On appeal, employer contends that the administrative law judge erred in finding the new x-ray evidence sufficient to establish complicated pneumoconiosis pursuant to Section 718.304(a).[2] In addition, employer contends that the administrative law judge erred in his weighing of the medical opinion of Dr. Hippensteel and in finding that the x-ray evidence outweighed the medical opinion evidence.[3] Employer further contends that the administrative law judge improperly shifted the burden of proof from claimant to employer in his weighing of the evidence. Claimant responds, urging affirmance of the administrative law judge's award of benefits. In a reply brief, employer reiterates its arguments. The Director, Office of Workers' Compensation Programs, has filed a letter stating that he will not file a substantive response unless requested to do so by the Board.

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,

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[2] The administrative law judge found that the presence of complicated pneumoconiosis was not established at 20 C.F.R. §718.304(b) and (c) because there was no new biopsy evidence showing complicated pneumoconiosis and none of the new medical opinions found the presence of complicated pneumoconiosis. Decision and Order on Remand at 7, 11.

[3] Employer does not discuss the administrative law judge's evaluation of the opinions of Drs. Branscomb and Mullins, who found that claimant did not have complicated pneumoconiosis, or contend that the administrative law judge should reconsider their opinions with the x-ray evidence showing complicated pneumoconiosis.

and in accordance with applicable law.[4] 33 U.S.C. §921(b)(3), as incorporated into the Act by 30 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 suffers from pneumoconiosis, that his pneumoconiosis arose out of coal mine employment, that he is totally disabled by a respiratory or pulmonary impairment, and that his total disability is due to pneumoconiosis. 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 a finding of entitlement. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-112 (1989); *Trent v. Director, OWCP*, 11 BLR 1-26, 1-27 (1987).

Additionally, when 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). 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, because claimant's prior claim was denied for failure to establish either that claimant's pneumoconiosis arose out of his coal mine employment or that he had a total respiratory disability due to pneumoconiosis, he had to submit new evidence to prove at least one of these elements of entitlement in order to satisfy the requirements of 20 C.F.R. §725.309. *See White v. New White Coal Co.*, 23 BLR 1-1, 1-3 (2004).

The administrative law judge determined that claimant established a change in an applicable condition of entitlement by establishing invocation of the irrebuttable presumption of total disability due to pneumoconiosis. This presumption, found at Section 411(c)(3) of the Act, and implemented by 20 C.F.R. §718.304, provides an irrebuttable presumption that a miner is totally disabled due to pneumoconiosis if the miner suffers from a chronic dust disease of the lung which, (a) when diagnosed by x-ray, yields one or more large opacities (greater than one centimeter in diameter) that would be classified in Category A, B, or C under the ILO classification system; (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(a)-(c).

On remand, pursuant to Section 718.304(a), the administrative law judge considered the eleven readings of four x-ray films dated August 1, 2002, June 16, 2003,

[4] This case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit, as claimant's coal mining employment was in West Virginia. *Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*); Director's Exhibits 1, 4.

January 21, 2004 and June 26, 2004. Drs. Patel and Miller, dually qualified B readers and Board-certified radiologists, classified the opacities seen on the August 1, 2002 x-ray as Category A, large opacities. Director's Exhibit 13; Claimant's Exhibit 1. Dr. Gaziano, a B reader, classified the August 1, 2002 x-ray as quality 1, Director's Exhibit 13; whereas, Dr. Wiot, a dually qualified B reader and Board-certified radiologist, classified the x-ray as unreadable, Employer's Exhibit 1. Drs. Alexander and Myers, dually qualified B readers and Board-certified radiologists, classified the opacities seen on the June 16, 2003 x-ray as Category A, large opacities. Claimant's Exhibit 3; Employer's Exhibit 4. Although Dr. Hippensteel, a B reader, read the January 21, 2004 x-ray as positive for only simple pneumoconiosis, based on an ILO classification of 2/1, and not complicated pneumoconiosis, Employer's Exhibit 3, Dr. Alexander, a dually qualified B reader and Board-certified radiologist, classified the opacities seen on this x-ray as Category A, Claimant's Exhibit 4. Lastly, Drs. Scott and Wheeler, dually qualified B readers and Board-certified radiologists, read the June 26, 2004 x-ray as negative for pneumoconiosis, Employer's Exhibit 7, whereas Drs. Alexander and Patel, also dually qualified B readers and Board-certified radiologists, classified the opacities seen on the x-ray as Category A, Claimant's Exhibit 6.

Weighing the interpretations of each of the x-ray films, the administrative law judge found that the August 1, 2002 x-ray was positive for complicated pneumoconiosis, by crediting the positive readings of Drs. Patel and Miller over the reading of Dr. Wiot, who found the film to be unreadable. In crediting the readings of Drs. Patel and Miller, the administrative law judge noted that three physicians, Drs. Gaziano, Patel and Miller, found the film to be of good quality for interpretation purposes. Decision and Order on Remand at 6. The administrative law judge also found the January 21, 2004 x-ray to be positive for complicated pneumoconiosis because Dr. Alexander's positive reading outweighed the negative reading of Dr. Hippensteel, based on Dr. Alexander's superior radiological credentials. *Id*. at 7. The administrative law judge, however, found that the two remaining x-ray films, dated June 16, 2003 and June 26, 2004, were in equipoise, as they were read as both positive and negative by equally qualified physicians. *Id*. Considering the new x-ray evidence as a whole, the administrative law judge found that the preponderance of the readings by the dually qualified physicians were positive for complicated pneumoconiosis and, therefore, found that the new x-ray evidence established the presence of complicated pneumoconiosis pursuant to Section 718.304(a). *Id*.

In challenging this finding, employer contends that the administrative law judge erred in relying on the numerical superiority of the positive x-rays and did not adequately weigh the evidence. Specifically, employer contends that the administrative law judge erred in finding the dually qualified physicians equally qualified. Employer contends that the administrative law judge erred in failing to accord greater weight to the interpretation of Dr. Wiot, who found the August 1, 2002 x-ray to be unreadable, because he is a C-reader as well as "one of the pre-eminent radiologists in the country." Employer's Brief

at 8. Employer also contends that the administrative law judge should have accorded greater weight to the interpretations of Drs. Wheeler, Scott and Meyer, who did not find pneumoconiosis, based on their status as professors of radiology. Employer's Brief at 9.[5] Employer contends, therefore, that the administrative law judge erred in weighing the new x-ray evidence and finding that a preponderance of the interpretations was positive for complicated pneumoconiosis pursuant to Section 718.304(a).

Contrary to employer's contentions, the administrative law judge reasonably weighed the x-ray evidence of record and found that the preponderance of the interpretations were positive for complicated pneumoconiosis. In particular, contrary to employer's contention, the administrative law judge is not required to accord greater weight to the x-ray interpretations of professors of radiology. *Worhach v. Director, OWCP*, 17 BLR 1-105, 1-108 (1993). In this case, the administrative law judge properly considered the quality of the readings, including the radiological qualifications of the physicians providing the readings, as well as the number of readings of each of the individual x-ray films. Thus, the administrative law judge provided valid bases for finding that the preponderance of the readings by the better qualified physicians established the presence of complicated pneumoconiosis. We, therefore, affirm his finding that claimant has established the presence of complicated pneumoconiosis pursuant to Section 718.304(a) by the new x-ray evidence. 20 C.F.R. §718.304(a); *Adkins v. Director, OWCP*, 958 F.2d 49, 16 BLR 2-61 (4th Cir. 1992); *Worhach*, 17 BLR at 1-108; *Edmiston v. F & R Coal Co.*, 14 BLR 1-65 (1990); *Roberts v. Bethlehem Mines Corp.*, 8 BLR 1-211 (1985); *see Staton v. Norfolk & Western Ry. Co.*, 65 F.3d 55, 19 BLR 2-271 (6th Cir. 1995).

In challenging the administrative law judge's weighing of Dr. Hippensteel's opinion, employer contends that the administrative law judge erred in discrediting Dr. Hippensteel's opinion of no complicated pneumoconiosis, because the physician's findings were contrary to the preponderance of the new x-ray evidence showing the presence of complicated pneumoconiosis. Employer contends that the administrative law judge failed to adequately consider the totality of Dr. Hippensteel's opinion, particularly his statements regarding the absence of a pulmonary or respiratory impairment, as instructed by the Board. In addition, employer contends that the administrative law judge improperly discredited Dr. Hippensteel's opinion because he relied upon inadmissible evidence, *i.e.*, the interpretations of the June 16, 2003 x-ray by Drs. Scott and Scatarige.

Employer's contention that the administrative law judge erred in his weighing of Dr. Hippensteel's opinion amounts to a request to reweigh the evidence, a function that

[5] Employer states that Dr. Meyer is a professor of radiology at the University of Cincinnati, Employer's Exhibit 4, and that Drs. Wheeler and Scott are professors of radiology at Johns Hopkins University School of Medicine. Employer's Exhibit 7; Employer's Brief at 9.

the Board is not empowered to perform. *See Anderson v. Valley Camp of Utah, Inc*., 12 BLR 1-111 (1989). Contrary to employer's contention, the administrative law judge considered the totality of Dr. Hippensteel's opinion, including his finding that the objective studies do not show a pulmonary or respiratory impairment. Decision and Order on Remand at 9-10; Employer's Exhibits 3, 8. The administrative law judge found, however, that Dr. Hippensteel's opinion, finding the absence of a pulmonary/respiratory impairment, was not sufficient to overcome the new x-ray evidence showing the presence of complicated pneumoconiosis, because Dr. Hippensteel was unaware that a majority of the x-ray interpretations was positive for the presence of complicated pneumoconiosis. Consequently, the administrative law judge properly discounted Dr. Hippensteel's opinion. *Underwood v. Elkay Mining, Inc*., 105 F.3d 946, 21 BLR 2-23 (4th Cir. 1997); Decision and Order on Remand at 11. Further, contrary to employer's argument, the administrative law judge could permissibly accord less weight to Dr. Hippensteel's opinion because his reliance, in part, on inadmissible evidence diminished the reliability of his opinion. *See Keener v. Peerless Eagle Coal Co*., 23 BLR 1-229, 1-242 n.15 (2007)(*en banc*). In addition, we reject, as unfounded, employer's argument that the administrative law judge improperly shifted the burden of proof to employer in his weighing of Dr. Hippensteel's opinion. Contrary to employer's assertion, the administrative law judge did not require employer to establish a specific alternative diagnosis for the large opacities seen on x-ray, but rather, the administrative law judge permissibly found that the x-ray evidence showing complicated pneumoconiosis outweighed the contrary opinion of Dr. Hippensteel. *See Clinchfield Coal Co. v. Lambert*, No. 06-1154, slip op. at 5 (4th Cir. Nov. 17, 2006)(unpub.).

Consequently, we affirm the administrative law judge's weighing of Dr. Hippensteel's opinion and we reject employer's contention that the administrative law judge erred in not crediting Dr. Hippensteel's opinion, that claimant does not suffer from complicated pneumoconiosis, over the new x-ray evidence showing the presence of complicated pneumoconiosis.[6] The administrative law judge properly found the new x-ray and medical opinion evidence when weighed together established the presence of complicated pneumoconiosis at Section 718.304. We, therefore, affirm the administrative law judge's finding that the weight of the newly submitted evidence is sufficient to establish the presence of complicated pneumoconiosis at Section 718.304. *See Lester v. Director, OWCP*, 993 F.2d 1143, 1145-6, 17 BLR 2-114, 2-117-8 (4th Cir. 1993); *Melnick v. Consolidation Coal Co.*, 16 BLR 1-31, 1-33 (1991)(*en banc*); Decision and Order on Remand at 11.

[6] Although the administrative law judge found that the new opinions of Drs. Hippensteel, Branscomb and Mullins did not establish the presence of complicated pneumoconiosis at Section 718.304(c), he found that, when the new evidence was weighed as a whole, the x-ray evidence outweighed the medical opinion evidence. Decision and Order on Remand at 11.

In light of our affirmance of the administrative law judge's finding that claimant has established the presence of complicated pneumoconiosis by the new evidence and, thereby, invocation of the irrebuttable presumption of total disability due to pneumoconiosis pursuant to Section 718.304, we also affirm his finding that claimant has established a change in one of the applicable elements of entitlement pursuant to Section 725.309(d). 20 C.F.R. §725.309(d); *White*, 23 BLR at 1-23.

The administrative law judge then considered the evidence as a whole, both old and new, and found that the evidence submitted in the prior claim was not as probative as the newly submitted evidence, because it was significantly older than the new evidence. Specifically, in considering the record as a whole, the administrative law judge properly noted that because pneumoconiosis is a progressive and irreversible disease, *see* 20 C.F.R. §718.201, it was appropriate to accord greater weight to the more recent evidence of record; especially, where a significant amount of time separated the old and new evidence. Thus, the administrative law judge reasonably accorded greater weight to the new x-ray evidence, showing complicated pneumoconiosis, which was taken in 2002, 2003, and 2004, than to the earlier evidence, which consisted of x-rays taken in 1970, 1972 and 1987, as well as pulmonary function and blood gas studies conducted in 1987, and the report of a physical examination conducted in 1987.[7] *Parsons v. Wolf Creek Collieries*, 23 BLR 1-29, 1-35 (2004)(*en banc*)(McGranery, J., concurring and dissenting); *Workman v. Eastern Associated Coal Corp.*, 23 BLR 1-22, 1-27 (2004) (*en banc*); *Gillespie v. Badger Coal Co.*, 7 BLR 1-839, 1-841 (1985); Decision and Order on Remand at 12. Consequently, we affirm the administrative law judge's finding that the record as a whole is sufficient to establish invocation of the irrebuttable presumption of total disability due to pneumoconiosis at Section 718.304(a). We also affirm, as unchallenged on appeal, the administrative law judge's finding that claimant has established that his pneumoconiosis arose out of coal mine employment pursuant to Section 718.203(b). *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

[7] The administrative law judge noted that all of the prior x-ray and medical opinion evidence found the existence of simple, but not complicated, pneumoconiosis. Decision and Order on Remand at 12.

Accordingly, the administrative law judge's Decision and Order on Remand 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