BRB No. 02-0877 BLA

KENNETH L. ATKINS	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
WESTMORELAND COAL COMPANY	)	DATE ISSUED:
	)	09/09/2003
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 of Stuart A. Levin, Administrative Law Judge, United States Department of Labor.

Kathy L. Snyder, Ashley M. Harman (Jackson & Kelly PLLC), Morgantown, West Virginia, for employer.

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

DOLDER, Chief Administrative Appeals Judge:

Employer appeals the Decision and Order (2000-BLA-0348) of Administrative Law Judge Stuart A. Levin awarding benefits on a 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]

[1] The Department of Labor has amended the regulations implementing the Federal Coal Mine Health and Safety Act of 1969, as amended. These regulations became effective on January 19, 2001, and are found at 20 C.F.R. Parts 718, 722, 725, and 726 (2002). All citations to the regulations, unless otherwise noted, refer to the amended regulations.

This case involving a duplicate claim pursuant to 20 C.F.R. '725.309(d)(2000) is before the Board for the second time.[2] Initially, the administrative law judge found that the medical evidence developed since the final denial of claimant=s prior 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, 30 U.S.C. '921(c)(3), as implemented by 20 C.F.R. '718.304. Consequently, the administrative law judge found that a material change in conditions was established as required by 20 C.F.R. '725.309(d)(2000), and awarded benefits.

Upon consideration of employer=s appeal, the Board held that the administrative law judge did not adequately resolve the conflicting x-ray evidence regarding the existence of complicated pneumoconiosis pursuant to 20 C.F.R. '718.304(a). *Atkins v. Westmoreland Coal Co*., BRB No. 01-0318 BLA (Jan. 18, 2002)(unpub.)(McGranery, J., dissenting). The Board held that although the administrative law judge credited Dr. DePonte=s ACategory A@ large opacity reading because Dr. DePonte was the only physician to have read a series of x-rays simultaneously, the administrative law judge Adid not adequately explain why the opportunity to read different x-rays simultaneously provided Dr. Deponte=s x-ray readings additional probative value or weight@ over those of several Board-certified radiologists and B-readers who also read multiple x-rays, albeit seriatim, as revealing no Category A, B, or C

[2] Claimant filed his initial claim on November 30, 1993. Director=s Exhibit 36-1. In a Decision and Order issued on November 3, 1995, Administrative Law Judge Vivian Schreter-Murray found approximately thirty-eight years of coal mine employment established and adjudicated the claim pursuant to 20 C.F.R. Part 718. Director=s Exhibit 36-48. The administrative law judge found the existence of simple pneumoconiosis arising out of coal mine employment established pursuant to 20 C.F.R. ''718.202(a)(1), (4) and 718.203(b), but found that total disability was not established pursuant to 20 C.F.R. '718.204(c)(1)-(4)(2000). Accordingly, she denied benefits. Claimant appealed, and the Board affirmed the administrative law judge=s findings as to the length of claimant=s coal mine employment and pursuant to 20 C.F.R. ''718.202(a)(1), (4), 718.203(b), and 718.204(c)(1)-(3)(2000), but vacated her finding pursuant to 20 C.F.R. '718.204(c)(4)(2000) and remanded the case for further consideration. Director=s Exhibit 36-55; *Atkins v. Westmoreland Coal Co.*, BRB No. 96-0396 BLA (June 28, 1996)(unpub.). In a Decision and Order On Remand issued on September 10, 1996, the administrative law judge again found that total disability was not established and denied benefits. Director=s Exhibit 36-56. Claimant appealed, and the Board affirmed the administrative law judge=s finding that total disability was not established and therefore affirmed the denial of benefits. Director=s Exhibit 36-62; *Atkins v. Westmoreland Coal Co.*, BRB No. 97-0194 BLA (Sep. 29, 1997)(unpub.). Claimant filed this duplicate claim on March 9, 1999. Director=s Exhibit 1.

large opacities. *Atkins*, slip op. at 8. The Board therefore vacated the administrative law judge=s finding pursuant to 20 C.F.R. '718.304(a) and remanded the case for him to reweigh the x-ray readings and fully explain his findings. The Board held further that the administrative law judge failed to consider all relevant evidence and substituted his judgment for that of the physicians when he refused to consider medical opinions that claimant does not have complicated pneumoconiosis because he has no respiratory or pulmonary impairment. *Atkins*, slip op. at 9. Consequently, the Board vacated the administrative law judge=s findings under 20 C.F.R. '718.304 and remanded the case for him to consider the medical opinions that claimant has no impairment in determining whether the existence of complicated pneumoconiosis was established.

On remand, the administrative law judge again gave Agreatest weight@ to Dr. DePonte=s readings because Dr. DePonte Awas the only one to review simultaneously the series of x-rays.@ Decision and Order at 10. In further explanation of his finding, the administrative law judge observed that Dr. Wiot=s and Dr. Wheeler=s Amemories of Claimant=s past x-rays is a less reliable basis for determining what a series of x-rays may reveal than Dr. DePonte=s simultaneous review of the actual x-ray in the series.@ Decision and Order at 11. The administrative law judge also discounted B-reader Dr. Dahhan=s readings because Dr. Dahhan stood alone in detecting no large abnormality on claimant=s chest x-ray. The administrative law judge concluded that Athe record establishes the presence of a large abnormality in claimant=s right upper lobe, . . . classifiable as pneumoconiosis, large opacity, category A,@ pursuant to 20 C.F.R. '718.304(a). Decision and Order at 12. In weighing the evidence, the administrative law judge failed to follow the Board=s instruction to consider the medical opinions that claimant has no impairment. The administrative law judge awarded benefits.

On appeal, employer contends that the administrative law judge erred in his analysis of the x-ray evidence and did not comply with the Board=s instruction to consider the medical opinions diagnosing no impairment. Claimant has not filed a response to employer=s appeal, and the Director, Office of Workers= Compensation Programs (the Director), has declined to participate 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 supported by substantial evidence, is rational, and is in accordance with law. 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 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); *Trent v. Director, OWCP*, 11 BLR 1-26, 1-27 (1987).

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 there has been a material change in conditions. 20 C.F.R. ' 725.309(d)(2000). The United States Court of Appeals for the Fourth Circuit, within whose jurisdiction this case arises, has held that pursuant to Section 725.309(d)(2000), the administrative law judge must consider all of the new evidence to determine whether claimant has proven at least one of the elements of entitlement previously adjudicated against him. *Lisa Lee Mines v. Director, OWCP [Rutter]*, 86 F.3d 1358, 1362, 20 BLR 2-227, 2-235 (4th Cir. 1996), *rev'g en banc*, 57 F.3d 402, 19 BLR 2-223 (4th Cir. 1995). If so, claimant has established a material change in conditions and the administrative law judge must then determine whether all of the record evidence, old and new, supports a finding of entitlement. *Id.*

Section 411(c)(3)(A) of the Act, implemented by Section 718.304(a) of the regulations, 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)(A); 20 C.F.R. '718.304(a). The Fourth Circuit court has held that, A[b]ecause prong (A) sets out an entirely objective scientific standard@ for diagnosing complicated pneumoconiosis, that is, an x-ray opacity greater than one centimeter in diameter, the administrative law judge must determine whether a condition which is diagnosed by biopsy or autopsy under prong (B) or by other means under prong (C) would show as a greater-than-one-centimeter opacity if it were seen on a chest x-ray. *Eastern Associated Coal Corp. v. Director, OWCP [Scarbro]*, 220 F.3d 250, 255, 22 BLR 2-93, 2-100 (4th Cir. 2000); *Double B Mining, Inc. v. Blankenship*, 177 F.3d 240, 243, --- BLR --- (4th Cir. 1999). 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 20 C.F.R. '718.304(a), employer contends that the administrative law judge did not adequately resolve the conflicting x-ray readings. The record contains thirty-three readings of four new chest x-rays. Seven readings classified a large abnormality in the upper lobe of claimant=s right lung as a Category A large opacity, twenty-five readings indicated that no large opacities were present and classified the right upper lobe abnormality

as possibly cancer or healed tuberculosis, and one reading described acute infiltrate in the right upper lobe.[3] Dr. DePonte, who read the May 3, 1999 x-ray as Category A, later compared that x-ray to two earlier x-rays. Comparing the x-rays, Dr. DePonte stated that the right upper lobe opacity seen on May 3, 1999 was also present on January 22, 1996 and December 3, 1997. Dr. DePonte concluded that because the mass was stable, it likely represented Aa conglomerate mass of pneumoconiosis.@ Director's Exhibit 19. Dr. Wheeler also noted the stability of the mass and identified the mass=s stability, its unilateral nature, and its presence without background nodularity as reflecting granulomatous disease such as tuberculosis. Employer's Exhibit 11 at 16, 19. When informed of Dr. DePonte=s observation of lesion stability, Dr. Wheeler stated, AWell, that sounds like it=s a stable mass, and hopefully it=s a granulomata.@ Employer's Exhibit 11 at 40.

In the Board=s previous decision, the Board instructed the administrative law judge to explain why Dr. DePonte=s opportunity to read different x-rays simultaneously made her readings more probative than those of other radiological experts who had read multiple x-rays as negative for large opacities. *Atkins*, slip op. at 8. On remand, the administrative law judge explained that Dr. Wiot=s and Dr. Wheeler=s Amemories of Claimant=s past x-rays is a less reliable basis for determining what a series of x-rays may reveal than Dr. DePonte=s simultaneous review of the actual x-ray in the series.@ Decision and Order at 11. Employer argues that the administrative law judge=s rationale adds little to the administrative law judge=s previous analysis, and does not resolve the conflicting evidence because Dr. DePonte merely learned what Dr. Wheeler also knew from his readings--that the right upper lobe mass was stable. Employer's Brief at 15-19.

As an initial matter, we affirm the administrative law judge=s determination to give

[3] The April 19, 1999 x-ray received three readings positive for simple pneumoconiosis that also noted the presence of a Category A large opacity, and seven negative readings. The May 3, 1999 x-ray received one negative A0/1@ reading for simple pneumoconiosis that also noted the presence of a Category A large opacity, and five negative readings. The August 17, 1999 x-ray received three readings positive for simple pneumoconiosis that also noted the presence of a Category A large opacity, six negative readings, and one reading not classified under the ILO system. The September 28, 1999 x-ray received seven readings negative for both simple pneumoconiosis and large opacities.

less weight to Dr. Dahhan=s B-readings because Dr. Dahhan was contradicted by all other readers in stating that claimant=s recent x-rays show no large abnormality at all in the right upper lobe. Substantial evidence supports the administrative law judge=s finding and employer has not challenged it. Director's Exhibit 27; Employer's Exhibit 13, Deposition Exhibit 2 at 2; *see Underwood v. Elkay Mining, Inc*., 105 F.3d 946, 949, 21 BLR 2-23, 2-28 (4th Cir. 1997)(The administrative law judge determines the weight and credibility of the evidence).

Nevertheless, we conclude that the administrative law judge=s overall finding pursuant to 20 C.F.R. '718.304(a) is not affirmable because he has not adequately explained his resolution of the remainder of the conflicting x-ray readings. On the facts herein, we are unable to discern the significance of his observation that Dr. Wheeler=s and Dr. Wiot=s memories may be a less reliable basis for determining what a series of x-rays may reveal, considering that Dr. Wheeler observed and commented on the same lesion stability that Dr. DePonte detected in her simultaneous review of the x-rays. Review of the record reflects that the conflict between Dr. DePonte and Dr. Wheeler concerned what the observed stability meant diagnostically. Director's Exhibit 19; Employer's Exhibit 11 at 16, 19, 40. Additionally, the Board previously held that the administrative law judge=s simultaneous review rationale did not adequately resolve the conflict between Dr. DePonte=s reading and those of other Board-certified Radiologists and B-readers such as Drs. Scott, Kim, Spitz, Shipley, Binns, Gogineni, and Baek diagnosing no complicated pneumoconiosis but instead describing granulomatous disease, tuberculosis, or cancer. *Atkins*, slip op. at 7-8. On remand, the administrative law judge did not explain how he weighed the readings of Drs. Scott, Kim, Spitz, Shipley, Binns, Gogineni, and Baek. Because the administrative law judge must resolve conflicts in the evidence, *Lafferty v. Cannelton Indus., Inc*., 12 BLR 1-190, 1-192 (1989), we must vacate the administrative law judge=s finding pursuant to 20 C.F.R. '718.304(a) and remand this case for him to reconsider the x-ray readings with full explanation of the relative weight accorded to the conflicting readings.

Employer next contends that the administrative law judge did not carry out the Board=s instruction to consider the medical opinions that claimant has no impairment in determining whether the existence of complicated pneumoconiosis was established pursuant to 20 C.F.R. '718.304. Employer's Brief at 7-14. Review of the administrative law judge=s Decision and Order confirms that he declined to follow the Board=s remand instruction. Decision and Order at 12. Consequently, we must again vacate the administrative law judge=s finding pursuant to 20 C.F.R. '718.304 and remand this case for him to consider the medical opinion evidence that claimant does not have complicated pneumoconiosis. *See Hall v. Director, OWCP*, 12 BLR 1-80, 1-82 (1988)(*en banc*)(A[A] lower forum must not deviate from the orders of a superior forum, regardless of the lower forum=s view of the instructions given it.@).

All of the evidence relevant to the presence or absence of complicated

pneumoconiosis pursuant to 20 C.F.R. ' 718.203(a)-(c) must be considered and weighed together. *Gollie v. Elkay Mining Co.*, BRB No. 02-0741 at 5 (July 31, 2003)(published); *Lester*, 993 F.2d at 1145-46, 17 BLR at 2-117-18; *Melnick*, 16 BLR at 1-33-34. As the Board noted previously, the administrative law judge correctly concluded that a claimant is not required to prove the existence of a totally disabling respiratory or pulmonary impairment in order to invoke the irrebuttable presumption under Section 718.304. However, it does not follow that medical opinions of no complicated pneumoconiosis based in part on the absence of impairment are irrelevant to whether the existence of complicated pneumoconiosis is established. The Fourth Circuit court has held that because Section 921(c)(3) provides an irrebuttable presumption only if Aa chronic dust disease of the lung@ is established, the totality of the evidence must be considered. *Lester*, 993 F.2d at 1145-46, 17 BLR at 2-117-18 (Holding that A[t]o make such a determination, the OWCP must necessarily look at all of the relevant evidence presented,@ and observing that Aif a miner is not actually suffering from the type of ailment with which Congress was concerned, there is no justification for presuming that the miner is entitled to benefits.@)(citation omitted). The Fourth Circuit court has also instructed that other evidence may show that x-ray opacities Aare not what they seem to be. . . .@ *Scarbro*, 220 F.3d at 256, 22 BLR at 2-101. Consequently, on remand the administrative law judge should reconsider all of the relevant evidence of record in accordance with the holdings of the Fourth Circuit court in *Lester* and *Scarbro*.

In sum, we vacate the administrative law judge=s finding that the existence of complicated pneumoconiosis was established pursuant to 20 C.F.R. ' 718.304, and his attendant finding that a material change in conditions was established pursuant to 20 C.F.R. ' 725.309(d)(2000), and remand this case for further consideration. Previously, the Board also instructed the administrative law judge to reconsider the issue of the onset date for the payment of benefits pursuant to 20 C.F.R. ' 725.503(b), if necessary. *Atkins*, slip op. at 12 (McGranery, J., dissenting). Because we have again vacated the finding of complicated pneumoconiosis, the administrative law judge is again instructed to reconsider the issue of

the onset date, for the reasons stated in the Board=s prior decision.[4]

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

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

I concur.

ROY P. SMITH
Administrative Appeals Judge

McGRANERY, Administrative Appeals Judge, dissenting:

I respectfully dissent from the majority=s determination to remand this case again for further explanation. I would affirm the administrative law judge=s decision awarding benefits.

The administrative law judge thoroughly analyzed all of the x-ray readings and

[4] Employer argues that it timely filed a brief on remand in response to the administrative law judge=s briefing order, yet the administrative law judge stated in his Decision and Order that no briefs were filed. Because we are remanding this case for further consideration, we simply note that on remand, the regulations provide any party with the opportunity to request permission to file a brief with the administrative law judge. 20 C.F.R. ' 725.455(d).

physician statements of record. He fully explained his crediting of Dr. DePonte=s readings over those of the other dually qualified radiologists. The evidence is undisputed that Dr. DePonte was in the best position to analyze the x-rays because she was able to compare a series of x-rays simultaneously, whereas the only other doctors who looked at a series of x-rays, Drs. Wiot and Wheeler, looked at the x-rays individually, over time. As the administrative law judge pointed out, Dr. Wiot made clear in his deposition that the radiologist who was able to read a series of films simultaneously had a distinct advantage over others. Employer's Exhibit 12 at 24; 2000 Decision and Order at 9. The other dually qualified radiologists did not have the benefit of seeing a series of films, even over time. Furthermore, the administrative law judge analyzed the doctors= findings and explained why Dr. DePonte=s diagnosis of complicated pneumoconiosis was more credible than the alternative diagnoses of tuberculosis or granulomatous disease, or possibly, cancer.

I strongly disagree with my colleagues= assertion that the administrative law judge disobeyed the Board=s instruction to consider the medical opinions that claimant has no impairment, in determining whether the existence of complicated pneumoconiosis was established at 20 C.F.R. ' 718.304. The administrative law judge reasonably asked for analytical guidance in the use of this evidence since the United States Court of Appeals for the Fourth Circuit declared in *Eastern Associated Coal Corp. v. Director, OWCP [Scarbro]*, 220 F.3d 250, 257, 22 BLR 2-93, 2-103 (4th Cir. 2000), that a medical opinion on the existence of complicated pneumoconiosis is relevant only insofar as it addresses the statutory-regulatory criteria. As the administrative law judge observed, neither the statute, 30 U.S.C. ' 921(c)(3), nor the regulation, 20 C.F.R. ' 718.304, requires the existence of an impairment.

In sum, the administrative law judge has fully discussed all relevant evidence and he has reasonably explained how that evidence establishes the existence of complicated pneumoconiosis. His Decision and Order awarding benefits should be affirmed.

REGINA C. McGRANERY
Administrative Appeals Judge