BRB No. 06-0191 BLA

CARNIS H. DELP	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
EASTERN ASSOCIATED COAL CORPORATION	)	DATE ISSUED: 09/22/2006
	)	
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 of William S. Colwell, Administrative Law Judge, United States Department of Labor.

S. F. Raymond Smith (Rundle and Rundle, L.C.), Pineville, West Virginia, for claimant.

Laura Metcoff Klaus (Greenberg Traurig LLP), Washington, D.C., for employer.

Before: SMITH, McGRANERY and HALL, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order (04-BLA-5403) of Administrative Law Judge William S. Colwell denying benefits on a subsequent 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). The administrative law judge credited claimant with thirty-five years of coal mine employment based on employer's concession

and adjudicated this claim pursuant to the regulations contained in 20 C.F.R. Part 718.[1] The administrative law judge found the newly submitted evidence insufficient to establish the presence of complicated pneumoconiosis and thereby insufficient to establish invocation of the irrebuttable presumption of total disability due to pneumoconiosis pursuant to 20 C.F.R. §718.304. Further, the administrative law judge found the newly submitted evidence insufficient to establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(i)-(iv). Consequently, the administrative law judge found the newly submitted evidence insufficient to establish a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309. Accordingly, the administrative law judge denied benefits.

On appeal, claimant challenges the administrative law judge's finding that the newly submitted evidence is insufficient to establish the presence of complicated pneumoconiosis at Section 718.304(a). Employer responds, urging affirmance of the administrative law judge's denial of benefits. The Director, Office of Workers' Compensation Programs, has declined to participate in this appeal.[2]

The Board must affirm the findings of the administrative law judge if they are supported by substantial evidence, are rational, and are in accordance with applicable law. 33 U.S.C. §921(b)(3), as incorporated by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

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[1]Claimant filed his first claim on April 7, 1987. Director's Exhibit 1. This claim was denied by the district director on September 16, 1987 because the evidence did not show that claimant was totally disabled by pneumoconiosis. *Id*. Because claimant did not pursue this claim any further, the denial became final. Claimant filed his second claim on November 9, 1989. Director's Exhibit 2. The district director denied this claim on January 10, 1990 on the basis that claimant failed to establish total disability. *Id*. The denial became final because claimant did not pursue this claim any further. Claimant filed his third claim on September 12, 1994. Director's Exhibit 3. On February 8, 1995, the district director denied this claim on the ground that the evidence did not show that claimant was totally disabled by pneumoconiosis. *Id*. Since claimant did not pursue this claim any further, the denial became final. Claimant filed his most recent claim on June 17, 2002. Director's Exhibit 5.

[2]Since the administrative law judge's findings that the newly submitted evidence is insufficient to establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(i)-(iv) are not challenged on appeal, we affirm these findings. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

Section 725.309 provides that a subsequent claim shall be denied unless claimant demonstrates that one of the applicable conditions of entitlement has changed since the date upon which the order denying the prior claim became final. The administrative law judge stated that "[s]ince [c]laimant failed to establish that he was totally disabled due to pneumoconiosis in the prior denials, the evidence will be reviewed to determine if [c]laimant has now established that condition has changed since February 8, 1995, the date of his most recent prior denial." Decision and Order at 3.

Claimant contends that the administrative law judge erred in finding that the newly submitted x-ray evidence is insufficient to establish complicated pneumoconiosis at 20 C.F.R. §718.304(a). Specifically, claimant asserts that "[t]he ALJ failed to make the equivalency determinations required under the regulation and simply accepted the contention of the employer's physicians that the large opacity on claimant's lung was not 'complicated pneumoconiosis'." Claimant's Brief at 5. Section 718.304 provides an irrebuttable presumption of total disability due to pneumoconiosis.[3] 20 C.F.R. §718.304(a)-(c); 30 U.S.C. §921(c)(3); *Gray v. SLC Coal Co.*, 176 F.3d 382, 21 BLR 2-615 (6th Cir. 1999); *see also Director, OWCP v. Eastern Coal Corp.* [*Scarbro*], 220 F.3d

[3]Section 718.304 provides in relevant part that:

> There is an irrebuttable presumption that a miner is totally disabled due to pneumoconiosis ..., if such miner is suffering or suffered from a chronic dust disease of the lung which:
>
> (a) When diagnosed by chest X-ray ... yields one or more large opacities (greater than 1 centimeter in diameter) and would be classified in Category A, B, or C...; or
>
> (b) When diagnosed by biopsy or autopsy, yields massive lesions in the lung; or
>
> (c) When diagnosed by means other than those specified in paragraphs (a) and (b) of this section, would be a condition which could reasonably be expected to yield the results described in paragraph (a) or (b) of this section had diagnosis been made as therein described: *Provided, however,* That any diagnosis made under this paragraph shall accord with acceptable medical procedures.

20 C.F.R. §718.304.

250, 256, 22 BLR 2-93, 2-100 (4th Cir. 2000); *Double B Mining, Inc. v. Blankenship*, 177 F.3d 240, 22 BLR 2-554 (4th Cir. 1999); *Lester v. Director, OWCP*, 993 F.2d 1143, 17 BLR 2-114 (4th Cir. 1993). The administrative law judge must weigh together the evidence at subsections 718.304(a), (b) and (c) before determining whether invocation of the irrebuttable presumption has been established.[4] *Gray*, 176 F.3d at 389, 21 BLR at 2-629; *Melnick v. Consolidation Coal Co.*, 16 BLR 1-31 (1991).

The United States Court of Appeals for the Fourth Circuit, within whose jurisdiction this case arises, has specifically held 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.

However, contrary to claimant's assertion, Fourth Circuit law does not require an administrative law judge to perform an equivalency determination with respect to x-ray evidence under Section 718.304(a). *Scarbro*, 220 F.3d at 256, 22 BLR at 2-100; *Blankenship*, 177 F.3d at 243, 22 BLR at 2-562. The administrative law judge must perform equivalency determinations only with respect to medical evidence considered under Section 718.304(b) and Section 718.304(c). *Id*. Thus, we reject claimant's assertion that the administrative law judge erred in failing to perform an equivalency determination of the x-ray evidence at Section 718.304(a).

The newly submitted evidence at Section 718.304(a) in this case consists of eight interpretations of four x-rays, dated August 6, 2002, August 14, 2002, September 12, 2003, and May 12, 2004. Dr. Patel, a dually qualified B reader and Board-certified radiologist, classified the opacities in the August 6, 2002 x-ray as size A, Director's Exhibit 17, while Dr. Wheeler, a professor of radiology and a dually qualified B reader and Board-certified radiologist, read this x-ray as negative for pneumoconiosis, Employer's Exhibit 2. Dr. Scott, a dually qualified B reader and Board-certified

[4]There is no autopsy or biopsy evidence of record. Thus, the presence of complicated pneumoconiosis at 20 C.F.R. §718.304(b) is precluded. Further, there is no medical evidence that could establish the presence of complicated pneumoconiosis at 20 C.F.R. §718.304(c): In a June 18, 2003 CT scan, Dr. Scatarige found that there was no evidence of coal workers' pneumoconiosis or silicosis. Director's Exhibit 30. In addition, with regard to the newly submitted medical reports, Drs. Balaji, Layton, Mullins and Zaldivar diagnosed coal workers' pneumoconiosis. However, no physician diagnosed a condition that would produce opacities greater than one centimeter in diameter on an x-ray.

radiologist, read the August 14, 2002 x-ray as negative for pneumoconiosis. Director's Exhibit 30. Drs. Aycoth and Miller, B readers, classified the opacities on the September 12, 2003 x-ray as size A, Claimant's Exhibits 1, 2, whereas Drs. Scatarige and Wheeler, dually qualified B readers and Board-certified radiologists, read this x-ray as negative for pneumoconiosis,[5] Employer's Exhibits 3, 4. Lastly, Dr. Wheeler read the May 12, 2004 x-ray as negative for pneumoconiosis. Employer's Exhibit 1.

The administrative law judge properly accorded greater weight to the negative x-ray readings provided by physicians who are both dually qualified as B readers and Board-certified radiologists, *Worhach v. Director, OWCP*, 17 BLR 1-105 (1993); *Roberts v. Bethlehem Mines Corp.*, 8 BLR 1-211 (1985), as well as professors of radiology, *Melnick*, 16 BLR at 1-37. The administrative law judge noted that both Drs. Patel and Wheeler are dually qualified as B readers and Board-certified radiologists. However, the administrative law judge reasonably found Dr. Wheeler's reading of the August 6, 2002 x-ray to be more persuasive than Dr. Patel's reading of this x-ray, because Dr. Wheeler is a professor of radiology.[6] *Id.* In addition, the administrative law judge reasonably found that the negative readings of the September 12, 2003 x-ray by Drs. Scatarige and Wheeler outweighed the findings of complicated pneumoconiosis by Drs. Aycoth and Miller, on the basis that Drs. Scatarige and Wheeler are professors of radiology and dually qualified as B readers and Board-certified radiologists.[7] *Id.* Since it is supported by substantial evidence, we affirm the administrative law judge's finding that the newly submitted evidence is insufficient to establish the presence of complicated pneumoconiosis at 20 C.F.R. §718.304(a).

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[5]The record reflects, and the administrative law judge noted, that like Dr. Wheeler, Dr. Scatarige is also a professor of radiology. Director's Exhibit 30; Employer's Exhibit 2.

[6]In considering Dr. Wheeler's credentials, the administrative law judge specifically stated:

> The record (EX 2) shows that Dr. Wheeler has a highly distinguished record as a radiologist. He serves as an associate professor of radiology at Johns Hopkins, has served as a consultant, has given numerous medical presentations, and has published 41 medical articles.

Decision and Order at 5.

[7]The administrative law judge stated that "[Dr. Scatarige] is an associate professor in radiology at Johns Hopkins, has published 35 medical articles, and 13 book chapters." Decision and Order at 5.

As the administrative law judge properly found the newly submitted evidence insufficient to establish the existence of complicated pneumoconiosis at 20 C.F.R. §718.304(a)-(c), we affirm the administrative law judge's finding that the newly submitted evidence is insufficient to establish invocation of the irrebuttable presumption of total disability due to pneumoconiosis at 20 C.F.R. §718.304.

Furthermore, in light of our affirmance of the administrative law judge's findings that the newly submitted evidence is insufficient to establish invocation of the irrebuttable presumption of total disability due to pneumoconiosis at 20 C.F.R. §718.304 and total disability at 20 C.F.R. §718.204(b), we affirm the administrative law judge's finding that the newly submitted evidence is insufficient to establish a change in an applicable condition of entitlement at 20 C.F.R. §725.309.

Accordingly, the administrative law judge's Decision and Order denying benefits is affirmed.

SO ORDERED.

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ROY P. SMITH
Administrative Appeals Judge

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REGINA C. McGRANERY
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge