BRB No. 08-0259 BLA

F.R.	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	DATE ISSUED: 09/30/2008
	)	
DOTCO ENERGY COMPANY, INCORPORATED	)	
	)	
and	)	
	)	
A. T. MASSEY C/O UNDERWRITERS SAFETY & CLAIMS	)	
	)	
Employer/Carrier-Respondents	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order Denying Benefits of Adele Higgins Odegard, Administrative Law Judge, United States Department of Labor.

Joseph E. Wolfe and W. Andrew Delph, Jr., (Wolfe Williams Rutherford & Reynolds), Norton, Virginia, for claimant.

Allison B. Moreman (Jackson Kelly PLLC), Lexington, Kentucky, for employer.

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

PER CURIAM:

Claimant appeals the Decision and Order Denying Benefits (06-BLA-0015) of Administrative Law Judge Adele Higgins Odegard rendered 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] This case involves claimant's third request for modification of the denial of a claim he originally filed on March 4, 1994. Director's Exhibit 1. The Board discussed previously this claim's full procedural history.[2]

In a Decision and Order issued on August 19, 1999, Administrative Law Judge Robert L. Hillyard denied claimant's first modification request, finding that claimant did not establish total disability pursuant to 20 C.F.R. §718.204 or that he was entitled to the irrebuttable presumption of total disability due to pneumoconiosis pursuant to 20 C.F.R. §718.304, and thus, did not establish a mistake in fact or change in conditions. *See* 20 C.F.R. §725.310 (2000)[3]; Director's Exhibit 79. Subsequently, claimant requested modification on December 8, 1999. Director's Exhibit 85.

In a Decision and Order issued on March 6, 2003, Administrative Law Judge Thomas F. Phalen, Jr., denied claimant's second modification request, finding that claimant did not establish a mistake in a determination of fact or a change in conditions. Director's Exhibit 136.

Upon review of claimant's appeals of decisions by both Judges Hillyard and Phalen,[4] the Board affirmed the administrative law judges' denials of benefits. [*F.L.R.*] *v. Dotco Energy Co.*, BRB Nos. 99-1247 BLA and 03-0463 BLA (Aug. 24, 2004)(unpub.).

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[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 (2008). All citations to the regulations, unless otherwise noted, refer to the amended regulations.

[2] [*F.L.R.*] *v. Dotco Energy Co.*, BRB Nos. 99-1247 BLA and 03-0463 BLA (Aug. 24, 2004)(unpub.); [*F.L.R.*] *v. Dotco Energy Co.*, BRB No. 97-0267 BLA (Sept. 24, 1997)(unpub.); *recon. denied*, [*F.L.R.*] *v. Dotco Energy Co.*, BRB No. 97-0267 BLA (Nov. 5, 1997)(unpub. Order); Director's Exhibits 49, 51, 148.

[3] The recent revisions to 20 C.F.R. §725.310 do not apply to claims, such as this one, that were pending on January 19, 2001, the effective date of the revised regulations. 20 C.F.R. §725.2(c). Where a former version of the regulations remains applicable, we will cite to the 2000 edition of the Code of Federal Regulations.

[4] Claimant requested and the Board granted reinstatement of his previous appeal, which the Board had dismissed pursuant to claimant's Motion to Remand for modification proceedings. Director's Exhibit 85.

Thereafter, claimant timely requested modification on May 9, 2005, pursuant to 20 C.F.R. §725.310 (2000), and submitted additional medical evidence. Director's Exhibit 149. The claim was referred to Administrative Law Judge Adele Higgins Odegard (the administrative law judge).

The administrative law judge credited claimant with 23.94 years of coal mine employment,[5] and found that claimant established the existence of simple pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.202(a)(1), (4), 718.203(b). Upon review of both the new and old evidence, the administrative law judge found that claimant did not establish entitlement to the irrebuttable presumption that he is totally disabled due to pneumoconiosis pursuant to Section 718.304, or establish that he is totally disabled pursuant to 20 C.F.R. §718.204(b)(2), (c). Consequently, the administrative law judge concluded that claimant did not establish a mistake in a determination of fact or a change in conditions pursuant to Section 725.310 (2000). Accordingly, the administrative law judge denied claimant's third request for modification, and denied benefits.

On appeal, claimant contends that the administrative law judge erred in finding that he was not entitled to the irrebuttable presumption of total disability due to pneumoconiosis based upon the x-ray and CT scan evidence pursuant to Section 718.304(a), (c).[6] Employer responds in support of the administrative law judge's denial of benefits. The Director, Office of Workers' Compensation Programs, declined to file a substantive response brief.[7]

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. 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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[5] The Board will apply the law of the United States Court of Appeals for the Sixth Circuit, as claimant was last employed in coal mining in Kentucky. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989)(*en banc*); Director's Exhibit 2.

[6] There was no biopsy or autopsy evidence in the record for consideration pursuant to 20 C.F.R. §718.304(b). *See* Decision and Order at 18.

[7] We affirm the administrative law judge's findings that claimant did not establish total disability due to pneumoconiosis pursuant to 20 C.F.R. §718.204(b)(2), (c), as these findings are unchallenged on appeal. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

Section 725.310 (2000) provides that a party may request modification of an award or denial of benefits on the grounds that a change in conditions has occurred or because a mistake in a determination of fact was made in the prior decision. 20 C.F.R. §725.310(a) (2000). The United States Court of Appeals for the Sixth Circuit, within whose jurisdiction this case arises, has held that the administrative law judge has the authority, if not the duty, to reconsider all the evidence for any mistake of fact or change in conditions. *Consolidation Coal Co. v. Worrell*, 27 F.3d 227, 230, 18 BLR 2-290, 2-296 (6th Cir. 1994).

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. Section 718.304 provides that there is an irrebuttable presumption that a miner is totally disabled due to pneumoconiosis if (a) an x-ray of the miner's lungs shows an opacity greater than one centimeter and would be classified in category A, B, or C; (b) a biopsy or autopsy shows massive lesions in the lung; or (c) when diagnosed by other means, the condition could reasonably be expected to reveal a result equivalent to (a) or (b). *See* 20 C.F.R. §718.304.[8]

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[8] Section 718.304 provides in relevant part:

> There is an irrebuttable presumption that a miner is totally disabled due to pneumoconiosis...if such miner is suffering...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.

The introduction of legally sufficient evidence of complicated pneumoconiosis does not automatically qualify a claimant for the irrebuttable presumption found at Section 718.304. The administrative law judge must first determine whether the evidence in each category tends to establish the existence of complicated pneumoconiosis, and then must weigh together the evidence at subsections (a), (b), and (c) before determining whether invocation of the irrebuttable presumption pursuant to Section 718.304 has been established. *See Gray v. SLC Coal Co.*, 176 F.3d 382, 389-90, 21 BLR 2-615, 2-628-29 (6th Cir. 1999); *Melnick v. Consolidation Coal Co.*, 16 BLR 1-31, 1-33 (1991)(*en banc).*

Pursuant to Section 718.304(a), the administrative law judge discussed the new x-ray evidence of record. Dr. Wheeler, a Board-certified radiologist and B reader, interpreted the December 2, 2006 x-ray by checking the "0" box for large opacities, and stating in a narrative that the masses shown on the x-ray were not large opacities, but rather, indicated granulomatous disease, with histoplasmosis more likely than tuberculosis. Employer's Exhibit 8. Dr. DePonte, a Board-certified radiologist and B reader, interpreted the December 2, 2006 x-ray as positive for category "B" large opacities. Claimant's Exhibit 2. Dr. DePonte also interpreted the January 13, 2007 x-ray as positive for category "B" large opacities, and noted that there had been a significant progression of the disease since July 13, 2001. Claimant's Exhibit 1. Dr. Wheeler did not check the box for large opacities in reading the January 13, 2007 x-ray, but stated in a narrative that the masses shown on the x-ray were compatible with granulomatous disease, with histoplasmosis being more likely than tuberculosis. Employer's Exhibit 10. Dr. Wheeler added that the masses were not large opacities of coal workers' pneumoconiosis in the absence of symmetrical small nodular infiltrates in the central, mid and upper lungs. *Id.* Dr. Scott, a Board-certified radiologist and B reader, also interpreted the January 13, 2007 x-ray. *Id.* He did not check the box for large opacities, but stated that the changes he saw on the x-ray were probably due to granulomatous disease such as tuberculosis or histoplasmosis. *Id.* Dr. Scott saw no background of small, rounded opacities to suggest silicosis or coal workers' pneumoconiosis.[9] *Id*.

Weighing the new x-ray evidence in conjunction with the x-ray evidence previously considered, the administrative law judge found that, in light of the readings by equally qualified doctors stating that the masses in claimant's lungs are not pneumoconiosis but are the result of a different disease, such as histoplasmosis, tuberculosis, or granulomatous disease, claimant did not establish by a preponderance of the evidence that he has complicated pneumoconiosis. Decision and Order at 21.

[9] The new x-ray evidence also contains an x-ray dated October 4, 2005, which was read as uniformly negative for pneumoconiosis by Drs. Repsher, Scott, and Wheeler. Employer's Exhibits 1, 7.

Claimant contends that the administrative law judge applied an incorrect burden of proof in weighing the new x-ray evidence pursuant to Section 718.304(a). Claimant's contention lacks merit. The administrative law judge properly placed the burden of proof on claimant to establish by a preponderance of the evidence that he was entitled to the irrebuttable presumption of total disability due to pneumoconiosis. *See Gray*, 176 F.3d at 389-90, 21 BLR at 2-628-29; *Melnick*, 16 BLR at 1-33; *see also Director, OWCP v. Greenwich Collieries* [*Ondecko*], 512 U.S. 267, 281, 18 BLR 2A-1, 2A-12 (1994); Decision and Order at 15-16, 19-21.

Claimant also contends that the administrative law judge erred in stating that Drs. Scott and Wheeler did not find any large opacities by x-ray, when they found large masses on the x-rays.[10] Contrary to claimant's contention, the administrative law judge properly found that the x-ray readings by Drs. Scott and Wheeler did not establish the large opacities required under Section 718.304(a) because they were not classified as Category A, B, or C. *See* 20 C.F.R. §718.304(a); Decision and Order at 18-19; Employer's Exhibits 8, 10. Additionally, Dr. Wheeler stated that the masses were not large opacities of coal workers' pneumoconiosis, and both Drs. Scott and Wheeler attributed the masses to granulomatous disease. *Id.* Thus, claimant's contention lacks merit.

Claimant next argues that the administrative law judge irrationally relied on the negative x-ray readings for complicated pneumoconiosis of Drs. Scott and Wheeler over the positive readings of Dr. DePonte, because the negative readings by Drs. Scott and Wheeler contradicted the administrative law judge's finding that simple pneumoconiosis was established. Claimant's contention lacks merit. The administrative law judge was not required to discredit the negative readings for complicated pneumoconiosis of Drs. Scott and Wheeler pursuant to Section 718.304(a) because these physicians did not

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[10] Claimant refers to the administrative law judge's statements in her decision that:

> There is some evidence in this matter that the Claimant may have complicated pneumoconiosis. The X-ray interpretations by Dr. Kathleen DePonte of the claimant's X-rays of 12/02/2006 and 1/13/2007 reflect Category B opacities (CX 1, 2). However, the Employer submitted evidence from other Board-certified radiologists regarding the same X-rays; these interpretations *surmised that the Claimant did not have any large opacities*: indeed, Dr. Wheeler and Dr. Scott stated that these X-rays did not reflect pneumoconiosis at all but rather reflected other diseases, such as histoplasmosis, tuberculosis, or granulomatous disease (EX 8, 10).

Decision and Order at 18-19 (emphasis added). *See* Claimant's Brief at 2, 4, 6-8.

diagnose simple pneumoconiosis by x-ray. *See generally Director, OWCP v. Rowe*, 710 F.2d 251, 255, 5 BLR 2-99, 2-103 (6th Cir. 1983).

Claimant further contends that the administrative law judge erred in relying on Dr. Wheeler's x-ray readings because the administrative law judge did not consider Dr. Wheeler's deposition testimony that he did not know whether claimant has complicated pneumoconiosis. Contrary to claimant's contention, the administrative law judge considered the testimony, in recognizing that Dr. Wheeler was not certain that claimant has granulomatous disease without a biopsy.[11] *See* Decision and Order at 25; Employer's Exhibit 9 at 46-47. The administrative law judge acted within her discretion in relying on the new x-ray readings by Dr. Wheeler, because Dr. Wheeler's testimony that he did not know whether claimant has granulomatous disease in the absence of a biopsy merely reflects the uncertainties in medicine. *See Perry v. Mynu Coals, Inc.*, 469 F.3d 360, 365-66, 23 BLR 2-374, 2-385-86 (4th Cir. 2006); Employer's Exhibit 9 at 47.

Therefore, based on the specific arguments raised by claimant, we affirm the administrative law judge's finding that claimant did not establish the existence of complicated pneumoconiosis by x-ray evidence pursuant to Section 718.304(a). *See Cox v. Benefits Review Board*, 791 F.2d 445, 447, 9 BLR 2-46, 2-48 (6th Cir. 1986); *Sarf v. Director, OWCP*, 10 BLR 1-119, 1-121 (1987); 20 C.F.R. §§802.211, 802.301.

Pursuant to Section 718.304(c), the administrative law judge discussed the new CT scan evidence. Dr. Lahr, whose qualifications are not in the record, interpreted the November 23, 2004 CT scan as reflective of an inflammatory process (progression of pneumoconiosis, such as silicosis with progressive massive fibrosis) or a neoplastic process. Director's Exhibit 149 at 9-10. Dr. Wheeler interpreted the November 23, 2004 CT scan, stating that the few small nodules could be coal workers' pneumoconiosis, but that the changes he saw were best explained by granulomatous disease, tuberculosis, or

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[11] The following exchange took place between claimant's counsel and Dr. Wheeler during Dr. Wheeler's deposition.

> Claimant's counsel: "Doctor, do I understand your testimony to be that you don't know whether [claimant] has complicated pneumoconiosis or not?"
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> Dr. Wheeler: "I assume he has granulomatous disease."
>
> Claimant's counsel: "But you don't know?"
>
> Dr. Wheeler: "No one knows: not until they get the biopsy. . . ."

Employer's Exhibit 9 at 47.

histoplasmosis. Employer's Exhibit 2. Dr. Scott read the November 23, 2004 CT scan as showing changes that were most likely due to tuberculosis or other granulomatous diseases. *Id*. Dr. Wilson, whose qualifications are not in the record, stated that the March 9, 2005 CT scan showed changes that may simply represent massive fibrosis associated with claimant's pneumoconiosis, but that a neoplastic process could not be excluded. Director's Exhibit 149 at 6. Dr. Wheeler interpreted the March 9, 2005 CT scan as showing masses compatible with conglomerate tuberculosis or histoplasmosis. Employer's Exhibit 2. Dr. Scott read the March 9, 2005 CT scan as revealing probable tuberculosis or other granulomatous disease.[12] *Id*.

The administrative law judge found that the new CT scan evidence did not establish the existence of complicated pneumoconiosis pursuant to Section 718.304(c), crediting the CT scan interpretations of Drs. Scott and Wheeler over those of Drs. Lahr and Wilson, based on the qualifications of Drs. Scott and Wheeler as Board-certified radiologists. Decision and Order at 19-20.

Claimant contends that the administrative law judge applied an incorrect burden of proof in weighing the new CT scan evidence pursuant to Section 718.304(c). However, as we have already held with respect to the new x-ray evidence, the administrative law judge properly placed the burden on claimant to establish by a preponderance of the evidence that he was entitled to the irrebuttable presumption of total disability due to

[12] Other new evidence at 20 C.F.R. §718.304(c) consisted of treatment notes from Dr. Munn, who opined that claimant may have progressive massive fibrosis, and a PET scan report from Dr. Compton, who agreed with Dr. Munn. Director's Exhibit 149 at 7-8, 12. The administrative law judge gave little weight to the opinions of Drs. Munn and Compton, because their qualifications were not in the record, and because their opinions were equivocal. Decision and Order at 21. We affirm the administrative law judge's decision to accord little weight to the opinions of Drs. Compton and Munn, as it is unchallenged on appeal. *See Skrack*, 6 BLR at 1-711.

The administrative law judge did not discuss the new medical opinions from employer's physicians, Drs. Fino, Ghio, Hippensteel, Repsher, and Wheeler, at Section 718.304(c). Employer's Exhibits 1-10. Drs. Ghio, Hippensteel, and Repsher diagnosed granulomatous disease, but not pneumoconiosis. Employer's Exhibits 1, 4, 6. Dr. Fino diagnosed simple pneumoconiosis. Employer's Exhibit 5. Dr. Wheeler testified by deposition that he interpreted claimant's x-rays and CT scans as showing histoplasmosis or tuberculosis, but that small nodules could represent simple coal workers' pneumoconiosis. Employer's Exhibit 9 at 24, 29-30. Thus, the opinions of Drs. Fino, Ghio, Hippensteel, Rephser, and Wheeler are not supportive of claimant's burden at Section 718.304(c).

pneumoconiosis pursuant to Section 718.304. *See Gray*, 176 F.3d at 389-90, 21 BLR at 2-628-29; *Melnick*, 16 BLR at 1-33; *see also Ondecko*, 512 U.S. at 281, 18 BLR at 2A-12; Decision and Order at 19-21. The administrative law judge permissibly weighed the conflicting CT scan readings based on the physicians' radiological qualifications. *See Staton v. Norfolk & Western Ry. Co.*, 65 F.3d 55, 59, 19 BLR 2-271, 2-279-80 (6th Cir. 1995); *Woodward v. Director, OWCP*, 991 F.2d 314, 321, 17 BLR 2-77, 2-87 (6th Cir. 1993); *White v. New White Coal Co.*, 23 BLR 1-1, 1-4-5 (2004). Consequently, we reject claimant's contention, and affirm the administrative law judge's finding that complicated pneumoconiosis was not established pursuant to Section 718.304(c).

In light of our affirmance of the administrative law judge's findings pursuant to Section 718.304(a), (c), we affirm the administrative law judge's finding that claimant was not entitled to the irrebuttable presumption of total disability due to pneumoconiosis pursuant to Section 718.304. Because claimant did not establish entitlement to the irrebuttable presumption or establish total disability pursuant to Section 718.204, we affirm the administrative law judge's findings that claimant did not establish a mistake in a determination of fact or a change in conditions pursuant to Section 725.310 (2000). Thus, the administrative law judge's denial of claimant's request for modification, and the denial of benefits, are affirmed.

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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BETTY JEAN HALL
Administrative Appeals Judge

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JUDITH S. BOGGS
Administrative Appeals Judge