BRB No. 11-0827 BLA

FRANK T. PENDRY	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
ROBINSON PHILLIPS COAL COMPANY	)	DATE ISSUED: 09/17/2012
	)	
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 Denying Benefits of Thomas M. Burke, Administrative Law Judge, United States Department of Labor.

S. F. Raymond Smith (David Huffman Law Services), Parkersburg, West Virginia, for claimant.

Waseem A. Karim (Jackson Kelly PLLC), Lexington, Kentucky, for employer.

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

PER CURIAM:

Claimant appeals the Decision and Order Denying Benefits (2009-BLA-5030) of Administrative Law Judge Thomas M. Burke, with respect to a subsequent claim[1] filed on January 11, 2008, pursuant to the provisions of the Black Lung Benefits Act, 30

[1] Claimant filed his initial claim for benefits on September 21, 1992, which the district director denied on March 12, 1993, because claimant did not establish that he was totally disabled. Director's Exhibit 1. Claimant took no further action until he filed the present subsequent claim.

U.S.C. §§901-944 (2006), *amended by* Pub. L. No. 111-148, §1556, 124 Stat. 119 (2010) (to be codified at 30 U.S.C. §§921(c)(4) and 932(*l*)) (the Act). The administrative law judge determined that claimant did not establish total disability at 20 C.F.R. §718.204(b)(2) and was not entitled to the irrebuttable presumption of total disability due to pneumoconiosis set forth in 20 C.F.R. §718.304, as he did not establish that he has complicated pneumoconiosis. Accordingly, the administrative law judge denied benefits.

On appeal, claimant argues that the administrative law judge applied the wrong legal standard when considering whether he established invocation of the irrebuttable presumption at 20 C.F.R. §718.304 by proving that he has complicated pneumoconiosis. Employer responds, urging affirmance of the denial of benefits. The Director, Office of Workers' Compensation Programs, has not filed a response brief 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 rational, supported by substantial evidence, and in accordance with applicable law.[2] 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).

When a claimant files an application 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); *White v. New White Coal Co.*, 23 BLR 1-1, 1-3 (2004). The "applicable conditions of entitlement" are "those conditions upon which the prior denial was based." 20 C.F.R. §725.309(d)(2). Claimant's prior claim was denied because he did not prove that he was totally disabled. Consequently, to obtain review of the merits of his claim, claimant had to submit new evidence establishing this element of entitlement. 20 C.F.R. §725.309(d)(2), (3).

The administrative law judge first considered whether the newly submitted evidence was sufficient to invoke the irrebuttable presumption of total disability due to pneumoconiosis. Pursuant to Section 411(c)(3) of the Act, 30 U.S.C. §921(c)(3), as implemented by 20 C.F.R. §718.304, the irrebuttable presumption is invoked when 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)

[2] The record reflects that claimant's coal mine employment was in West Virginia. Director's Exhibit 4. Accordingly, this case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(en banc).

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); 20 C.F.R. §718.304. The United States Court of Appeals for the Fourth Circuit, within whose jurisdiction this case arises, has held that, "[b]ecause prong (A) sets out an entirely objective scientific standard" for diagnosing complicated pneumoconiosis,[3] 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, 22 BLR 2-554, 2-561-62 (4th Cir. 1999).

The introduction of legally sufficient evidence of complicated pneumoconiosis does not automatically qualify a claimant for the irrebuttable presumption found at 20 C.F.R. §718.304. The administrative law judge must examine all the evidence on this issue, i.e., evidence of simple and complicated pneumoconiosis, as well as evidence that pneumoconiosis is not present, resolve any conflict, and make a finding of fact. *Lester v. Director, OWCP*, 993 F.2d 1143, 1145-46, 17 BLR 2-114, 2-117-18 (4th Cir. 1993); *Gollie v. Elkay Mining Corp*., 22 BLR 1-306, 1-311 (2003); *Melnick v. Consolidation Coal Co.*, 16 BLR 1-31, 1-33-34 (1991)(en banc).

Under 20 C.F.R. §718.304(a), the administrative law judge considered six interpretations of two x-rays, dated February 20, 2008 and June 2, 2009. Decision and Order at 10. Dr. Forehand, a B reader, determined that the February 20, 2008 film contained a Category B large opacity. Drs. Wheeler and Scatarige, both dually-qualified as B readers and Board-certified radiologists, read this film as negative for complicated pneumoconiosis. Director's Exhibit 13; Employer's Exhibits 2, 3. With respect to the x-ray dated June 2, 2009, Dr. Ahmed, a dually-qualified radiologist, determined that it contained a Category B large opacity, while Drs. Wheeler and Scott, dually-qualified radiologists, read the film as negative for complicated pneumoconiosis. Claimant's Exhibit 1; Employer's Exhibits 7, 9. Because the majority of readings by dually-qualified physicians was negative, the administrative law judge determined that the x-ray

[3] The condition described by these criteria is referred to as "complicated pneumoconiosis," although that term does not appear in the statute or the regulations. *Eastern Associated Coal Corp. v. Director, OWCP* [*Scarbro*], 220 F.3d 250, 255, 22 BLR 2-93, 2-100 (4th Cir. 2000), *citing Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 7, 11 (1976); *Double B Mining, Inc. v. Blankenship*, 177 F.3d 240, 242-43 (4th Cir.1999).

evidence was insufficient to establish the existence of complicated pneumoconiosis under 20 C.F.R. §718.304(a). Decision and Order at 10-11.

The administrative law judge further found that the newly submitted biopsy evidence at 20 C.F.R. §718.304(b) was insufficient to establish that claimant has complicated pneumoconiosis, as the sole biopsy report of record, prepared by Dr. Imbing, did not contain a diagnosis of a massive lesion. Decision and Order at 11; Director's Exhibit 14. Pursuant to 20 C.F.R. §718.304(c), the administrative law judge determined that the newly submitted interpretations of a digital x-ray dated August 27, 2008 and a CT scan dated July 25, 2007, did not establish the existence of complicated pneumoconiosis, as they did not contain diagnoses of the disease.[4] Decision and Order at 11; Employer's Exhibits 1, 4. With respect to the newly submitted medical opinions of Drs. Hippensteel, Spagnolo and Forehand, the administrative law judge accorded greatest weight to the opinions in which Drs. Hippensteel and Spagnolo ruled out the presence of complicated pneumoconiosis, as they were more thoroughly documented. Decision and Order at 11-12; Director's Exhibit 13; Employer's Exhibits 1, 5, 6. Weighing all of the newly submitted evidence together, the administrative law judge concluded that because the evidence, as a whole, did not establish the existence of complicated pneumoconiosis, claimant was not entitled to invocation of the irrebuttable presumption of total disability due to pneumoconiosis at 20 C.F.R. §718.304. *Id*. at 12.

Claimant asserts that the administrative law judge's findings under 20 C.F.R. §718.304 are erroneous, as "instead of reviewing the objective evidence to determine if the claimant's objective findings show that he was entitled to the benefit of the presumption of [20 C.F.R.] §718.304, the [administrative law judge] reversed the order and appeared to believe he must first determine if the claimant suffered from what the employer's physicians define as 'complicated pneumoconiosis' and only then would determine whether or not he was entitled to the benefit of the presumption." Claimant's Brief at 7. Claimant argues that this "exactly reverses the process," and, therefore, the

[4] Dr. Hippensteel read the digital chest x-ray dated August 27, 2008 and observed a density in the right mid-lung measuring three by five and one-half centimeters. Employer's Exhibit 1. Dr. Hippensteel concluded that it was possibly an acute infiltrate, or cancer, but that it did not appear to be coal workers' pneumoconiosis. *Id*. Dr. Wheeler read the CT scan dated July 25, 2007 and described a five centimeter oval mass in the right upper lung and other masses measuring up to three centimeters in diameter. Employer's Exhibit 4. Dr. Wheeler stated that the CT scan showed no evidence of coal workers' pneumoconiosis, which he explained manifests as symmetrical small nodular infiltrates in the middle and upper lungs. *Id*. Dr. Wheeler also noted that the masses are not conglomerate coal workers' pneumoconiosis because they have no background of small nodules. *Id*.

administrative law judge applied an improper legal standard. *Id*. Claimant further maintains that the administrative law judge should have considered "whether the objective evidence showing the presence of large opacities in the claimant's lung[,] which met the criteria of 20 C.F.R. §718.304[,] entitled him to the benefit of the regulation's irrebuttable presumption." *Id*. Consequently, claimant contends that "as a matter of law" the opinions in which Drs. Hippensteel and Spagnolo stated that the evidence is inconsistent with a diagnosis of complicated pneumoconiosis, cannot be credited. *Id*. at 8.

Claimant's arguments are without merit. Contrary to claimant's assertions, the mere presence of a mass on an x-ray greater than one centimeter, regardless of its cause, does not satisfy claimant's burden of proof. *See Lester*, 993 F.2d at 1145-46, 17 BLR at 2-117-18; *Gollie*, 22 BLR at 1-311. As previously indicated, the regulation relevant to the use of x-ray evidence in this context requires that claimant suffer from a chronic dust disease of the lung which, when diagnosed by x-ray, yields a large opacity (greater than one centimeter in diameter), classified as Category A, B, or C. 20 C.F.R. §718.304(a). Further, the Fourth Circuit has ruled that the diagnosis of a condition by biopsy under 20 C.F.R. §718.304(b), or by other means under 20 C.F.R. §718.304(c), must be accompanied by a finding that the condition would appear as an opacity greater than one centimeter in diameter on a chest x-ray. *Scarbro*, 220 F.3d at 255, 22 BLR at 2-100; *Blankenship*, 177 F.3d at 243, 22 BLR at 2-561-62. Although Drs. Wheeler, Scatarige, and Scott observed large masses on x-ray, they did not classify them as large opacities consistent with complicated pneumoconiosis. *See* Employer's Exhibits 2, 3, 7, 9. Furthermore, the administrative law judge acted within his discretion as fact-finder in determining that the newly submitted x-ray evidence was negative for complicated pneumoconiosis at 20 C.F.R. §718.304(a), based upon the preponderance of negative readings by dually-qualified radiologists. *See Scarbro*, 220 F.3d at 255, 22 BLR at 2-100.

The administrative law judge also rationally found that the newly submitted biopsy, digital x-ray and CT scan evidence do not satisfy the terms of 20 C.F.R. §718.304(b) or (c), as the physicians who viewed this evidence did not diagnose massive lesions, nor did they indicate that the conditions they observed would appear as opacities larger than one centimeter in diameter on x-ray. *See Blankenship*, 177 F.3d at 243, 22 BLR at 2-561-62. Regarding the newly submitted medical opinion evidence, the administrative law judge acted within his discretion in according greater weight to the opinions in which Drs. Hippensteel and Spagnolo stated that claimant did not have complicated pneumoconiosis because the physicians based their conclusions on a more thorough review of the evidence. *See Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 21 BLR 2-323 (4th Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 21 BLR 2-269 (4th Cir. 1997). We affirm, therefore, the administrative law judge's findings that claimant did not establish the existence of complicated pneumoconiosis at 20 C.F.R.

§718.304 and, thus, did not invoke the irrebuttable presumption of total disability due to pneumoconiosis. *See Lester*, 993 F.2d at 1145-46, 17 BLR at 2-117-18; *Gollie*, 22 BLR at 1-311; *Melnick*, 16 BLR at 1-33-34.

The administrative law judge also considered the newly submitted evidence relevant to 20 C.F.R. §718.204(b)(2) and determined that it was insufficient to establish that claimant is totally disabled. Decision and Order at 12-14. We affirm this finding, as it is unchallenged on appeal. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).[5] Based upon these findings, claimant was precluded from demonstrating a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309(d). *See White*, 23 BLR at 1-3.

Accordingly, the administrative law judge's Decision and Order Denying 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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JUDITH S. BOGGS
Administrative Appeals Judge

[5] Because we have affirmed the administrative law judge's finding that claimant did not establish total disability under 20 C.F.R. §718.204(b)(2), the rebuttable presumption of total disability due to pneumoconiosis set forth in amended Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4), is not available to claimant in this case.