

BRB No. 03-0691 BLA

BILLY GLENN DILLON	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
BIG HILL COAL COMPANY, INCORPORATED	)	
	)	DATE ISSUED: 06/03/2004
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-Awarding Benefits of Richard A. Morgan, Administrative Law Judge, United States Department of Labor.

Dennis James Keenan (Hinkle & Keenan), South Williamson, Kentucky, for claimant.

W. Barry Lewis (Lewis & Lewis), Hazard, Kentucky, for employer.

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

PER CURIAM:

Employer appeals the Decision and Order-Awarding Benefits (2001-BLA-1143) of Administrative Law Judge Richard A. Morgan on a duplicate claim<sup>1</sup> 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).<sup>2</sup> The parties stipulated to, and the administrative law judge credited claimant with, sixteen years of coal mine employment. The administrative law judge found that claimant established the existence of complicated pneumoconiosis pursuant to 20 C.F.R. §718.304 and a material change in conditions pursuant to 20 C.F.R. §725.309 (2000). On appeal, employer contends that the administrative law judge erred in several respects: in finding the evidence established the existence of complicated pneumoconiosis; in substituting his own medical opinion for that of the physicians; and in failing to comply with the requirements of the Administrative Procedure Act (APA), 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 5 U.S.C. §919(d), and 30 U.S.C. §932(a). Claimant responds, urging affirmance of the award of benefits. The Director, Office of Workers' Compensation Programs, has filed a letter, indicating that he will not respond to the instant appeal.<sup>3</sup>

The Board's scope of review is defined by statute. If the administrative law judge's findings of fact and conclusions of law are supported by substantial evidence, are

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<sup>1</sup> Claimant filed his initial claim on October 11, 1996. Director's Exhibit 29-1. In a Decision and Order issued on May 24, 1999, Administrative Law Judge Gerald M. Tierney denied benefits, finding that claimant established the existence of pneumoconiosis arising out coal mine employment, but failed to establish total disability pursuant to 20 C.F.R. §718.204. Director's Exhibit 29-39. Claimant's appeal was untimely filed and dismissed by the Board. *Dillon v. Big Hill Coal Co.*, BRB No. 99-1013 BLA (July 6, 1999) (unpublished Order). The administrative law judge found that because claimant did not appeal the Board's order, nor take any further action within one year of the July 6, 1999 Order, the 1996 claim is finally denied and administratively closed. Decision and Order-Awarding Benefits at 3. On October 12, 2000, claimant filed the current duplicate claim. Director's Exhibit 1.

<sup>2</sup> 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.

<sup>3</sup> We affirm, as unchallenged on appeal, the administrative law judge's finding that the record establishes sixteen years of coal mine employment. *See Coen v. Director, OWCP*, 7 BLR 1-30 (1984); *Skrack v. Island Coal Co.*, 6 BLR 1-710 (1983).

rational, and are consistent with applicable law, they are binding upon this Board and may not be disturbed. 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).

In order to establish entitlement to benefits in a living miner’s claim pursuant to 20 C.F.R. Part 718, claimant must prove that he suffers from pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, and that the pneumoconiosis is totally disabling. *See* 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure to establish any one of these elements precludes entitlement. *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(*en banc*).

Employer contends that the administrative law judge substituted his medical opinion for that of a radiologist in finding that the abnormalities reported on x-ray and CT scan were greater than one centimeter. Employer further argues that in violation of the APA, the administrative law judge failed to weigh all the relevant evidence, specifically the contrary opinions of Drs. Baker, Ranavaya, Fino, Dahhan and Wheeler which did not contain diagnoses of complicated pneumoconiosis.

The administrative law judge found that the record contains x-ray interpretations of recent films dated August 14, 2000, November 14, 2000, January 6, 2001 and February 19, 2001. Decision and Order-Awarding Benefits at 6; Director’s Exhibits 10-13; Employer’s Exhibit 4. The administrative law judge found that Drs. Navani and Gaziano reported Size A large opacities on the November 14, 2000 film; that Dr. Gayler<sup>4</sup> also reported Size A large opacities on the February 19, 2001 film, stating “cannot exclude tb, favor pneumoconiosis;” and that Dr. Scott reported an ambiguous finding of “Size A?...changes could be TB, unknown activity.” Decision and Order-Awarding Benefits at 6; Director’s Exhibits 12, 13, 23. The administrative law judge further found that on the November 14, 2000 film, Dr. Wheeler reported a 1.5 centimeter mass compatible with “Tb or possible large opacity on CWP or tumor;” and that the February 19, 2001 x-ray revealed “Size A?” large opacities and “probable 2cm mass...compatible with granuloma or possible tumor.” Decision and Order-Awarding Benefits at 7; Director’s Exhibit 23. The administrative law judge determined that the x-ray interpretations of Drs. Baker, Ranavaya and Fino of the November 14, 2000 film, as well as the readings by Drs. Dahhan and Fino of the January 6, 2001 film, are negative for complicated pneumoconiosis.

The administrative law judge recognized that the physicians disagree as to whether there is radiological evidence of complicated pneumoconiosis. Decision and Order-Awarding Benefits at 6. The administrative law judge found that most of the physicians

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<sup>4</sup>The Decision and Order contains an incorrect spelling for Dr. Gayler. Director’s Exhibit 23.

who are B readers and pulmonologists, *i.e.*, Drs. Baker, Dahhan and Fino, did not find large opacities nor diagnosed complicated pneumoconiosis. Decision and Order-Awarding Benefits at 7. In contrast, the administrative law judge noted that the radiological specialists, Drs. Navani, Gayler, Scott and Wheeler, who are B readers and Board-certified radiologists, found large opacities and/or a mass greater than one centimeter, which would meet the classification requirements for complicated pneumoconiosis under 20 C.F.R §718.304(a). *Id.* Further, the administrative law judge found that the readings of Drs. Navani, Gaziano and Gayler were clearly positive for large opacities, although the latter noted the possibility of a disease other than pneumoconiosis, and Drs. Scott and Wheeler also questioned whether the “suggestive large opacities” represented complicated pneumoconiosis. Decision and Order-Awarding Benefits at 13. In view of the conflicting findings, the administrative law judge properly found that the x-ray evidence “neither precludes nor establishes the presence of complicated pneumoconiosis,” pursuant to Section 718.304(a). *Id.*

Under Section 718.304(c), the administrative law judge noted that Dr. Wheeler suggested a biopsy or CT scan to determine whether claimant’s large opacities are due to granulomatous disease or cancer. *Id.* Dr. Narra, who conducted the CT scan, observed that “opacities are 3 to 10 mm in sizes seen bilaterally...secondary to complicated pneumoconiosis. CT chest with contrast is otherwise normal.” Director’s Exhibit 28; Decision and Order-Awarding Benefits at 14. The administrative law judge correctly acknowledged that the ten millimeter opacity is equivalent to one centimeter in size and that the range of opacities found by Dr. Narra does not exceed one centimeter as is required under Section 718.304(a). *Id.*

The administrative law judge then weighed all of the newly submitted evidence together and found that the medical opinions of Drs. Ranavaya, Dahhan, and Wheeler, who found advanced simple pneumoconiosis rather than complicated pneumoconiosis, are less credible because they did not consider the CT scan results. Director’s Exhibits 8, 22-24, 26, 28; Decision and Order-Awarding Benefits at 14. The administrative law judge also determined that Dr. Narra’s conclusion, that there are CT scan abnormalities “secondary to complicated pneumoconiosis,” is consistent with the x-ray evidence and, therefore, sufficient to establish the presence of complicated pneumoconiosis pursuant to Section 718.304. Director’s Exhibit 28; Decision and Order-Awarding Benefits at 14.

The administrative law judge’s finding with respect to the opinions of Drs. Ranavaya, Dahhan, and Wheeler is affirmed, as it is rational and supported by substantial evidence. *Carson v. Westmoreland Coal Co.*, 18 BLR 1-18 (1994), *modif. on recon.* 20 BLR 1-64 (1996); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*). We cannot affirm, however, the administrative law judge’s analysis of Dr. Narra’s opinion in conjunction with the x-ray evidence. The administrative law judge did not acknowledge or resolve the conflict between his prior determination that the x-ray evidence was

inconclusive as to the existence of complicated pneumoconiosis and his assessment of Dr. Narra's opinion, *i.e.*, that it was most supportive of a finding of complicated pneumoconiosis because the physician diagnosed complicated pneumoconiosis and "the x-ray readers clearly found right lung mass well over 1.0 cm." Decision and Order-Awarding Benefits at 14. Further, the administrative law judge did not explain why he concluded that a CT scan which yields one or more large opacities measuring less than one centimeter in diameter was equivalent to a chest x-ray which yields one or more large opacities measuring greater than one centimeter in diameter as required by Section 718.304(a). If the administrative law judge identified the opacity seen on the CT scan as the same opacity read on x-ray as a large opacity, he must have scientific evidence to support that finding. Accordingly, we must vacate this finding and remand the case to the administrative law judge for reconsideration of whether the newly submitted evidence relevant to invocation of the irrebuttable presumption, when considered together, is sufficient to establish the existence of complicated pneumoconiosis. *Melnick v. Consolidation Coal Co.*, 16 BLR 1-31 (1991)(*en banc*). If the administrative law judge finds that the newly submitted evidence is sufficient to establish complicated pneumoconiosis and, thus, a material change in conditions pursuant to Section 725.309(d) (2000), the administrative law judge must then consider whether the evidence of record as a whole, including that submitted with the previous claim, supports a finding of entitlement to benefits. *See Sharondale Corp. v. Ross*, 42 F.3d 993, 19 BLR 2-10 (6th Cir. 1994).

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

SO ORDERED.

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NANCY S. DOLDER, Chief  
Administrative Appeals Judge

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REGINA C. McGRANERY  
Administrative Appeals Judge

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BETTY JEAN HALL  
Administrative Appeals Judge