BRB No. 03-0553 BLA

THEODORE B. BARKER	)	
	)	
Claimant	)	
	)	
v.	)	
	)	
WESTMORELAND COAL COMPANY	)	DATE ISSUED: 05/28/2004
	)	
Employer-Petitioner	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Respondent	)	DECISION and ORDER

Appeal of the Decision and Order Awarding Benefits of Linda S. Chapman, Administrative Law Judge United States Department of Labor.

Kathy L. Snyder (Jackson Kelly PLLC), Morgantown, West Virgina, for employer.

Jennifer U. Toth (Howard M. Radzely, Solicitor of Labor; Donald S. Shire, Associate Solicitor; Rae Ellen Frank James, Deputy Associate Solicitor; Michael J. Rutledge, Counsel for Administrative Litigation and Legal Advice), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

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

McGRANERY, Administrative Appeals Judge:

Employer appeals the Decision and Order Awarding Benefits of Administrative Law Judge Linda S. Chapman (the administrative law judge) 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] Claimant filed the instant duplicate

[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

claim for benefits on July 15, 1999.[2] The district director awarded benefits on the claim on March 29, 2000, based on evidence showing the existence of complicated pneumoconiosis. Director's Exhibit 29. Pursuant to employer's request for a hearing, Administrative Law Judge Daniel F. Solomon held a formal hearing and issued a Decision and Order denying benefits on October 18, 2000 because claimant failed to establish that he had a totally disabling respiratory impairment or that he had complicated pneumoconiosis and was, therefore, presumptively disabled. The Board affirmed that denial on October 23, 2001. Director's Exhibit 53. Claimant submitted new evidence along with his request for modification on June 19, 2002. Director's Exhibit 55. Considering the record *de novo*, the administrative law judge found that x-ray and CT scan evidence established the existence of complicated pneumoconiosis. The administrative law judge rejected medical opinions that claimant did not have complicated pneumoconiosis because they relied on evidence that claimant did not have a sufficient pulmonary impairment to justify a diagnosis of complicated pneumoconiosis. The administrative law judge found, therefore, based on x-ray and CT scan evidence, that claimant was entitled to invocation of the irrebuttable presumption of totally disabling pneumoconiosis at 30 U.S.C. §921(c)(3), as implemented by 20 C.F.R. §718.304. Accordingly, benefits were awarded.

On appeal, employer argues that the administrative law judge erred in finding the existence of complicated pneumoconiosis established by summarily dismissing medical opinions which found the absence of a respiratory impairment. Employer also contends that the administrative law judge erred in finding a change in conditions established based on x-ray evidence without first finding that a mistake in a determination of fact had been made in the prior decision denying benefits. Finally, employer contends that the administrative law judge erred in invoking the irrebuttable presumption of totally disabling pneumoconiosis without properly weighing opinions regarding the cause of the abnormalities seen on x-rays. Claimant has not responded. The Director, Office of Workers' Compensation Programs, responds, contending that employer's argument is without merit, *i.e.*, that the administrative law judge erred in addressing the issue of entitlement without first determining whether a mistake in a determination of fact had

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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.

[2] An earlier claim, filed March 8, 1978, was denied by Administrative Law Judge Julius Johnson, who found the x-ray evidence was sufficient to invoke the interim presumption at 20 C.F.R. §727.203(a)(1), but other evidence established rebuttal at 20 C.F.R. §727.203(b)(3). That denial was affirmed by the Board on August 29, 1996.

been made in the prior decision denying benefits. The Director does not, otherwise, address the other arguments made by employer.

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).

Employer first argues that the administrative law judge erred in dismissing medical opinions, *i.e.*, those of Drs. Dahhan, Fino, Repsher and Hippensteel, relying on the absence of a pulmonary impairment to find that claimant did not have complicated pneumoconiosis. The administrative law judge found the existence of complicated pneumoconiosis established based on x-ray and CT scan evidence: category A opacities seen on the November 12, 2001 x-ray, by Drs. Alexander and Ahmed, dually qualified physicians; category A opacity, seen by Dr. Alexander, on the most recent x-ray conducted October 10, 2002; and category B opacities, seen by Dr. Alexander, on CT scans. The administrative law judge correctly found that the opinions of Drs. Fino, Dahhan, Wheeler, Hippensteel and Repsher, that claimant did not have complicated pneumoconiosis because claimant did not have sufficient evidence of a pulmonary impairment to justify a diagnosis of complicated pneumoconiosis, were insufficient to overcome the x-ray and CT scan evidence showing category A and B opacities. The administrative law judge, therefore, dismissed these physicians' opinions regarding the nonexistence of complicated pneumoconiosis because she found that they were relying on a "medical" diagnosis of complicated pneumoconiosis, rather than the Congressionally mandated definition set forth in the statute. This was proper:

> "[T]he presumption under §921(c)(3) is triggered by a congressionally defined condition, for which the statute gives no name but which, if found to be present, creates an irrebuttable presumption that disability or death was caused by pneumoconiosis . . . . In short, the statute betrays no intent to incorporate a purely medical definition.

Eastern Assoc. Coal Corp. v. Director, OWCP [Scarbro], 220 F.3d 250, 257, 22 BLR 2-93, 2-103 (4th Cir. 2000); *see* 30 U.S.C. §921(c)(3); 20 C.F.R. §718.304(a), (c); *Double B Mining, Inc. v. Blankenship*, 177 F.3d 240, 22 BLR 2-554 (4th Cir. 1999).

Employer next argues that because this is a petition for modification of a decision denying a duplicate claim, the administrative law judge cannot find a change in conditions, *i.e.*, modification, established without first determining whether the previous administrative law judge made a mistake in a determination of fact when he found that the evidence failed to establish the existence of complicated pneumoconiosis. Employer

asserts that much of the same evidence before the administrative law judge was also in the record before Judge Solomon and was credited by Judge Solomon, *i.e.*, medical opinions stating that the large lesions seen on claimant's x-rays were not the same as large opacities of coal workers' pneumoconiosis, but were large lesions which could be caused by scar tissue from old granulomatous disease such as tuberculosis. *See* Director's Exhibit 48 at 13. Employer contends that the administrative law judge may not disregard Judge Solomon's findings regarding this evidence, which were affirmed by the Board, Director's Exhibit 53, without first finding that Judge Solomon made a mistake in a determination of fact in finding that the evidence showed that claimant did not have complicated pneumoconiosis. In support of its argument, employer cites the Board's decision in *Furgerson v. Jericol Mining, Inc.* 22 BLR 1-216, 1-224-25 (2002), construing the holding of the United States Court of Appeals for the Sixth Circuit in *Sharondale Corp. v. Ross*, 42 F.3d 993, 19 BLR 2-10 (6th Cir. 1994), requiring the administrative law judge to compare the evidence in the record supporting entitlement with evidence in the prior claim before determining that a material change in conditions has been established. Employer's argument is without merit.

Sixth Circuit law on the evidence necessary to establish a material change in conditions has no application to this Fourth Circuit case. *See Lisa Lee Mines v. Director, OWCP [Rutter]*, 86 F.3d 1358, 1363 n.11, 20 BLR 2-227, 2-237 n.11 (4th Cir. 1996), *rev'g en banc*, 57 F.3d 402, 19 BLR 2-223 (4th Cir. 1995), *cert. denied*, 510 U.S. 1090 (1997). But even if it did, claimant is not obliged to show a material change in conditions based on the record in Judge Solomon's case; the petition for modification has merged with the claim in that case. *See Jessee v. Director, OWCP*, 5 F.3d 723, 18 BLR 2-26 (4th Cir. 1993). Claimant must, therefore, show a material change in conditions from his 1978 claim which was finally denied in 1996. He has done so. Since the instant case is a petition for modification of Judge Solomon's decision denying benefits, claimant is not required to show a mistake in a determination of fact or a change in conditions since Judge Solomon's decision; it is sufficient if claimant shows a mistake in the ultimate determination of entitlement. *Jessee*; *see Betty B Coal Co. v. Director, OWCP [Stanley]*, 194 F.3d 491, 22 BLR 2-1 (4th Cir. 1999).

Finally, employer argues that the administrative law judge erred in finding the irrebuttable presumption invoked without properly weighing the cause of the abnormalities seen on the x-rays. Employer contends that even when there are x-rays showing large opacities sufficient to establish the existence of complicated pneumoconiosis, claimant must still establish that the large opacities are due to coal mine employment rather than another cause.

In addressing evidence pointing to a cause other than coal mine employment for the abnormalities seen on claimant's x-rays, however, the administrative law judge found the evidence to be speculative as the doctors guessed as to the cause of the abnormalities

seen on x-ray. Specifically, the administrative law judge found the opinions of Drs. Wheeler, Scott, Scatarige, and Hippensteel to be equivocal as to the cause of the opacities seen on claimant's x-ray because they attributed the cause of the opacities to tuberculosis or granulomatous disease when there was no evidence in the record that claimant had ever suffered from or been exposed to tuberculosis, or other inflammatory process, or other disease process.[3] Employer does not dispute that statement. The administrative law judge, therefore, properly rejected the evidence pointing to causes, other than coal mine employment, for the abnormalities seen on claimant's x-rays. Decision and Order at 12; Director's Exhibit 55; *see* 20 C.F.R. §718.203(b); *Justice v. Island Creek Coal Co.*, 11 BLR 1-91, 1-94 (1988); *see also Scarbro*, 220 F.3d 250, 22 BLR 2-93; *Blankenship*, 177 F.3d 240, 22 BLR 2-554. Accordingly, we affirm the administrative law judge's findings that claimant had complicated pneumoconiosis and that the cause of claimant's complicated pneumoconiosis was coal mine employment.

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[3] Regarding the November 12, 2001 x-ray: Dr. Wheeler found it to be negative for pneumoconiosis, but noted a mass in the right, mid and upper lung which he felt was "probably tuberculosis;" Dr. Scott found it showed pneumoconiosis as well as peripheral and lineal infiltrates and/or fibrosis, which he felt was "probably" due to tuberculosis; and Dr. Scatarige found pneumoconiosis, as well as a 3 x 6 cm. mass in the right lung, which he felt "could be" tuberculosis or cancer. Employer's Exhibit 1.

Regarding the October 10, 2002 x-ray, Dr. Wheeler found no pneumoconiosis, but noted an 8 x 3 cm. mass, which he felt was "probably" tuberculosis; Dr. Scott found no pneumoconiosis, but also noted a possible, ill-defined 4 cm. mass in the right upper lung, which he felt was tuberculosis; and Dr. Scatarige found no pneumoconiosis, but noted a 3.5 cm. mass in the right upper lung, which he felt "favored" tuberculosis. Employer's Exhibit 5.

Dr. Hippensteel, who reviewed the medical evidence, conceded that claimant had coal workers' pneumoconiosis, with some coalescence of opacities on x-ray, but determined that claimant did not have complicated pneumoconiosis based on varying factors identified in the reports, including the absence of pulmonary impairment, the rapid change in the x-rays, and the calcifications in the coalescence; he believed these findings "suggested" granulomatous disease. Employer's Exhibits 3, 4.

Accordingly, the administrative law judge's the Decision and Order Awarding Benefits is affirmed.

SO ORDERED.

REGINA C. McGRANERY
Administrative Appeals Judge

I concur:

BETTY JEAN HALL
Administrative Appeals Judge

SMITH, Administrative Appeals Judge, dissenting:

I respectfully dissent from my colleagues' decision affirming the administrative law judge's award of benefits. The Black Lung Act requires that all relevant evidence be considered. 30 U.S.C. §923(b). The administrative law judge erred, therefore, in "dismissing" the opinions of Drs. Fino, Dahhan, Wheeler, Hippensteel and Repsher because their opinions that claimant did not have complicated pneumoconiosis were based on their findings that claimant did not have sufficient evidence of a pulmonary impairment to justify a diagnosis of complicated pneumoconiosis. *See Eastern Assoc. Coal Corp. v. Director, OWCP [Scarbro]*, 220 F.3d 250, 22 BLR 2-93 (4th Cir. 2000); *Lester v. Director, OWCP*, 993 F.2d 1143, 17 BLR 2-114 (4th Cir. 1995); *Melnick v. Consolidation Coal Co.*, 16 BLR 1-31 (1991)(*en banc*); *see also Marcum v. Director, OWCP*, 11 BLR 1-23 (1987). Because the opinions address the existence of complicated pneumoconiosis, the administrative law judge must consider them.

Likewise, I believe the administrative law judge erred in invoking the irrebuttable presumption, 30 U.S.C. §921(c)(3), without properly weighing the cause of the abnormalities seen on x-ray. It is claimant's burden to establish that his pneumoconiosis arose out of coal mine employment. 20 C.F.R. §718.203. In this case, the administrative law judge assumes that claimant's pneumoconiosis arose out of coal mine employment because he accepted the evidence showing the existence of complicated pneumoconiosis. The administrative law judge did not, however, separately determine whether claimant's pneumoconiosis, albeit complicated, arose out of coal mine employment.

Finally, inasmuch as this case must be remanded for consideration of all the evidence relevant to the existence of complicated pneumoconiosis, I would also remand the case for reconsideration of modification. *See Betty B Coal Co. v. Director, OWCP [Stanley]*, 194 F.3d 491, 22 BLR 2-1 (4th Cir. 1999); *Hess v. Director, OWCP*, 21 BLR 1-141 (1998)

Accordingly, for the reasons discussed, I would vacate the administrative law judge's award of benefits and remand this case for further consideration.

ROY P. SMITH
Administrative Appeals Judge