

BRB No. 07-0713 BLA

J.J.T.)
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 Claimant-Petitioner)
)
 v.) DATE ISSUED: 05/20/2008
)
 MAPLE MEADOW MINING COMPANY)
)
 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 Richard T. Stansell-Gamm, Administrative Law Judge, United States Department of Labor.

S.F. Raymond Smith (Juliet W. Rundle & Associates), Pineville, West Virginia, for claimant.

Christopher M. Hunter (Jackson Kelly, PLLC), Charleston, West Virginia, for employer.

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

PER CURIAM:

Claimant appeals the Decision and Order (06-BLA-5060) of Administrative Law Judge Richard T. Stansell-Gamm denying benefits 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). This case involves a subsequent claim filed on April 22, 2003.¹ After crediting claimant with ten years of coal mine employment, the

¹ Claimant's initial claim, filed on January 8, 1998, was finally denied by the district director on June 11, 1998 because claimant did not establish that he was totally

administrative law judge found that the new evidence did not establish total disability pursuant to 20 C.F.R. §718.204(b). The administrative law judge, therefore, found that none of the applicable conditions of entitlement had changed since the date upon which the denial of claimant's prior claim became final, pursuant to 20 C.F.R. §725.309(d). Accordingly, the administrative law judge denied benefits.

On appeal, claimant contends that the administrative law judge erred in finding that the new evidence did not establish the existence of complicated pneumoconiosis pursuant to 20 C.F.R. §§718.204(b)(1), 718.304. Employer responds in support of the administrative law judge's denial of benefits. The Director, Office of Workers' Compensation Programs, has not filed a response brief.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).

Where a miner files a claim 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 failed to establish that he was totally disabled. Director's Exhibit 2. Consequently, claimant had to submit new evidence establishing that he is totally disabled pursuant to 20 C.F.R. §718.204(b) in order to obtain review of the merits of his 2003 claim. 20 C.F.R. §725.309(d)(2),(3).

Claimant argues that the administrative law judge erred in finding that claimant

disabled. Director's Exhibit 1. Claimant's second claim, filed on November 14, 2000, was finally denied by the district director on February 27, 2001 because claimant did not establish that he was totally disabled. Director's Exhibit 2.

² Because no party challenges the administrative law judge's findings that the new evidence did not establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(i)-(iv), these findings are affirmed. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

did not establish the existence of complicated pneumoconiosis, and therefore was not entitled to invocation of the irrebuttable presumption of total disability due to pneumoconiosis set out at 20 C.F.R. §718.304. 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; (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. §718.304.³

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 of no pneumoconiosis, resolve any conflict, and make a finding of fact. *Melnick v. Consolidation Coal Co.*, 16 BLR 1-31, 33-34 (1991) (*en banc*); *Truitt v. North Am. Coal Corp.*, 2 BLR 1-199 (1979), *aff'd sub nom. Director, OWCP v. North Am. Coal Corp.*, 626 F.2d 1137, 2 BLR 2-45 (3d Cir. 1980).

³Section 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.

In *Eastern Associated Coal Corp. v. Director, OWCP [Scarbro]*, 220 F.3d 250, 22 BLR 2-93 (4th Cir. 2000), the United States Court of Appeals for the Fourth Circuit, within whose jurisdiction this case arises, held that a single piece of relevant evidence could support an administrative law judge's finding that the irrebuttable presumption was successfully invoked "if that piece of evidence outweighs conflicting evidence in the record." *Scarbro*, 220 F.3d at 256, 22 BLR at 2-101.

Claimant contends that the administrative law judge erred in finding that the new x-ray evidence did not establish the existence of complicated pneumoconiosis pursuant to 20 C.F.R. §718.304(a).⁴ Claimant specifically contends that the administrative law judge erred in finding that Dr. Ahmed's interpretation of claimant's February 15, 2006 x-ray did not establish the existence of complicated pneumoconiosis pursuant to 20 C.F.R. §718.304(a).

The administrative law judge initially considered whether claimant's February 15, 2006 x-ray revealed the existence of a large pulmonary opacity, *i.e.*, an opacity greater than one centimeter in diameter.⁵ The administrative law judge noted that four physicians, Drs. Ahmed, Scott, Wheeler, and Miller, interpreted claimant's February 15, 2006 x-ray. The administrative law judge further noted that each of these physicians was qualified as a B reader and Board-certified radiologist. Because three of the four physicians, Drs. Ahmed, Scott, and Wheeler, noted the presence of an opacity greater than one centimeter in diameter, the administrative law judge found that claimant's

⁴ Claimant does not contend that the new evidence establishes the existence of complicated pneumoconiosis pursuant to 20 C.F.R. §718.304(b) or (c).

⁵ The record also contains interpretations of x-rays taken on May 14, 2003 and June 30, 2004. Because equally qualified physicians disagreed as to whether claimant's May 14, 2003 x-ray revealed the presence of an opacity greater than one centimeter in diameter, the administrative law judge found that this film was "inconclusive" on the issue. Decision and Order at 9; Director's Exhibits 15, 16, 30. The administrative law judge further found that neither of the physicians who interpreted claimant's June 30, 2004 x-ray interpreted the film as revealing the presence of an opacity greater than one centimeter in diameter. Decision and Order at 9; Director's Exhibit 30; Employer's Exhibit 1. The administrative law judge, therefore, found that these x-rays did not establish the existence of an opacity greater than one centimeter in diameter. Decision and Order at 9. Because no party challenges these findings, they are affirmed. *Skrack*, 6 BLR at 1-711.

February 15, 2006 x-ray established the existence of a large pulmonary opacity.⁶ Decision and Order at 10.

However, the administrative law judge properly recognized that, in weighing the x-ray evidence, after determining that there was a mass greater than one centimeter in diameter, he was also required to address whether the mass was due to pneumoconiosis, *i.e.*, whether the mass would be classified “in Category A, B, or C” under one of three recognized classification systems. *See* 20 C.F.R. §718.304(a)(1)-(3); *Scarbro*, 220 F.3d at 255, 22 BLR at 2-100. The administrative law judge, therefore, considered the opinions of Drs. Ahmed, Scott, and Wheeler regarding the nature of the large opacity revealed on claimant’s February 15, 2006 x-ray.

Dr. Ahmed opined that the size A opacity that he found on claimant’s February 15, 2006 x-ray was “very likely part of complicated pneumoconiosis,” but noted that a “malignancy cannot be excluded.” Claimant’s Exhibit 1. Drs. Scott and Wheeler did not find any large opacities consistent with pneumoconiosis on this x-ray.⁷ Employer’s Exhibit 5.

The administrative law judge found that:

⁶ The administrative law judge also found that the other medical evidence of record did not refute the radiographic evidence of a large pulmonary opacity in claimant’s lungs. *See* Decision and Order at 10-12.

⁷ Dr. Scott noted that:

Apical nodular infiltrates with 4 cm. mass or focal infiltrate right apex containing calcified granulomata. Apical location of changes makes [tuberculosis], unknown activity, the most likely diagnosis. Cannot [rule out] minimal component of silicosis/[coal workers’ pneumoconiosis].

Employer’s Exhibit 5. The latter statement appears to relate to Dr. Scott’s finding of small opacities having a profusion of 0/1 on the February 15, 2006 x-ray.

Although Dr. Wheeler noted that there was a “possible ill defined 2-3 cm. mass, infiltrate or fibrosis [in the] lower right apex,” he did not relate the mass to pneumoconiosis. Employer’s Exhibit 5.

According to Dr. Ahmed, the large pulmonary opacity is consistent with pneumoconiosis. Yet, at the same time, Dr. Ahmed could not rule out a malignancy. In Dr. Scott's opinion, the 4 cm. mass was not consistent with pneumoconiosis. Instead, Dr. Scott believed the mass involved infiltrate and granulomas. Likewise, Dr. Wheeler did not consider the ill-defined 2-3 cm. mass to be consistent with pneumoconiosis. According to Dr. Wheeler, the pulmonary mass represented an infiltrate or unspecified fibrosis.

In assessing the radiologists' diverse assessment, I reach two conclusions. First, the consensus of Dr. Scott and Dr. Wheeler that the pulmonary mass is not consistent with pneumoconiosis represents the preponderance of the evidence. Second, although Dr. Ahmed believed the mass was consistent with pneumoconiosis, his opinion is somewhat equivocal because he acknowledges that he cannot rule out that the large pulmonary opacity may be a malignant mass. Accordingly, I find insufficient evidence to establish that the large opacity identified in [claimant's] chest x-ray involves pneumoconiosis.

Decision and Order at 14.⁸

Because a majority of the physicians (Drs. Scott and Wheeler) opined that the large mass on claimant's February 15, 2006 x-ray was not related to pneumoconiosis, the administrative law judge permissibly found that claimant failed to establish, by a preponderance of the evidence, that this film supported a finding of complicated pneumoconiosis pursuant to 20 C.F.R. §718.304(a). Moreover, the administrative law judge recognized that Dr. Ahmed, while indicating that the large mass on this x-ray was "very likely part of complicated pneumoconiosis," also noted that a malignancy could not be excluded. Decision and Order at 14. The administrative law judge permissibly found that the "somewhat equivocal" nature of Dr. Ahmed's conclusion undermined its credibility on the issue of complicated pneumoconiosis. See *U.S. Steel Mining Co. v. Director, OWCP [Jarrell]*, 187 F.3d 384, 391, 21 BLR 2-639, 2-652-53 (4th Cir. 1999); *Melnick*, 16 BLR at 1-37; *Justice v. Island Creek Coal Co.*, 11 BLR 1-91, 1-94 (1988); *Campbell v. Director, OWCP*, 11 BLR 1-16, 1-19 (1987). Because it is based upon substantial evidence, we affirm the administrative law judge's finding that the new x-ray

⁸ The administrative law judge also found that the other new evidence of record, *i.e.*, the objective studies and medical opinion evidence, was of "little probative value" in assessing the nature of the large pulmonary mass revealed by claimant's February 15, 2006 x-ray. Decision and Order at 13-14.

evidence did not establish the existence of complicated pneumoconiosis pursuant to 20 C.F.R. §718.304(a).

Based on the foregoing, we affirm the administrative law judge's finding that the new evidence did not establish the existence of complicated pneumoconiosis pursuant to 20 C.F.R. §718.304. As claimant raises no other challenge to the administrative law judge's decision, we affirm the denial of benefits.

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

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge