

BRB No. 03-0159 BLA

MELVIN O=DELL, SENIOR	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
CONSOLIDATION COAL COMPANY	)	
	)	DATE ISSUED: 10/31/2003
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 Linda S. Chapman, Administrative Law Judge, United States Department of Labor.

James M. Talbert-Slagle (Legal Practice Clinic, Washington and Lee University School of Law), Lexington, Virginia, for claimant.

Williams S. Mattingly (Jackson & Kelly PLLC), Morgantown, West Virginia, for employer.

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

PER CURIAM:

Employer appeals the Decision and Order Awarding Benefits (2001-BLA-1169) of Administrative Law Judge Linda S. Chapman 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).<sup>1</sup> The administrative law judge found that the instant case constituted a duplicate claim pursuant to 20 C.F.R. '725.309(d)(2000),<sup>2</sup> and that the medical evidence developed since the denial of claimant=s prior claim established the existence of complicated pneumoconiosis, which entitled claimant to the irrebuttable presumption of total disability due to pneumoconiosis at Section 411(c)(3) of the Act, 30 U.S.C. '921(c)(3), as implemented by 20 C.F.R. '718.304. Consequently, the administrative law judge found that a material change in conditions was established pursuant to 20 C.F.R. '725.309(d)(2000) and found that claimant was entitled to benefits commencing October 1998.

On appeal, employer argues that the administrative law judge erred in finding that claimant established the existence of complicated pneumoconiosis by failing to properly weigh the conflicting evidence of record and by concluding that the evidence failed to show that a disease process unrelated to coal mine employment caused the large opacities reflected on x-ray. Employer also argues that the administrative law judge=s analysis of the evidence impermissibly shifted the burden of proof from claimant to employer. Lastly, employer argues that the administrative law judge erred in finding October 1998, a date which preceded the prior denial of benefits, to be the onset date of benefits in this duplicate claim. Claimant responds and urges affirmance of the award of benefits. The Director, Office of Workers= Compensation Programs (the Director), has declined to participate 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 supported by substantial evidence, is rational, and is in accordance with law. 33 U.S.C. '921(b)(3), as incorporated into the Act by 30 U.S.C. '932(a); *O=Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

To be entitled to benefits under the Act, claimant must demonstrate that he has pneumoconiosis, that his pneumoconiosis arose out of coal mine employment, that he is totally disabled, and that his total disability is due to pneumoconiosis. 30 U.S.C. '901; 20

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<sup>1</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>2</sup> Claimant initially filed a claim for benefits on July 15, 1998, which was denied by the district director on November 4, 1998 because claimant failed to establish any of the elements of entitlement. Director=s Exhibit 30. No further action was taken until the filing of the instant, duplicate claim on July 28, 2000. Director=s Exhibit 1. On September 30, 2002, the administrative law judge issued the Decision and Order awarding benefits from which employer now appeals.

C.F.R. ' ' 718.3, 718.202, 718.203, 718.204. Failure to establish any one of these elements precludes entitlement. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-112 (1989); *Trent v. Director, OWCP*, 11 BLR 1-26, 1-27 (1987).

Section 411(c)(3)(A) of the Act, as implemented by Section 718.304, provides an irrebuttable presumption of total disability or death due to pneumoconiosis if the miner is suffering or was 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.

30 U.S.C. ' 921(c)(3)(A); 20 C.F.R. ' 718.304.

In addition, the United States Court of Appeals for the Fourth Circuit, within whose jurisdiction this case arises, has held that, A[b]ecause prong (A) sets out an entirely objective scientific standard@ for diagnosing complicated pneumoconiosis, 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); see *Double B Mining, Inc. v. Blankenship*, 177 F.3d 240, 243 (4th Cir. 1999). In determining whether claimant has established invocation of the irrebuttable presumption of total disability due to pneumoconiosis pursuant to Section 718.304, the administrative law judge must weigh together all relevant evidence, *Lester v. Director, OWCP*, 993 F.2d 1143, 1145-46, 17 BLR 2-114, 2-117-18 (4th Cir. 1993); *Melnick v. Consolidation Coal Co.*, 16 BLR 1-31, 1-33-34 (1991)(*en banc*), see 30 U.S.C. ' 923(b); *Island Creek Coal Co. v. Compton*, 211 F.3d 203, 22 BLR 2-162 (4th Cir. 2000), but a single piece of relevant evidence can support invocation of the irrebuttable presumption if it outweighs conflicting evidence of record, *Scarbro*, 220 F.3d 256, 22 BLR at 2-101. The Fourth Circuit went on to state:

if the x-ray evidence vividly displays opacities exceeding one centimeter, its probative force is not reduced because the evidence under some other prong is inconclusive or less vivid. Instead, the x-ray evidence can lose force only if other evidence affirmatively shows that the opacities are not there or are not what they seem to be, perhaps because of an intervening pathology, some technical problem with the equipment used or incompetence of the reader.

*Scarbro*, 220 F.3d 256, 22 BLR at 2-101.

Employer concedes that claimant=s x-ray evidence shows an opacity greater than one centimeter on x-ray, Employer=s Brief at 13 n. 3, but contends that the administrative law judge erred in failing to find that another disease process unrelated to coal dust exposure was responsible for the opacity. Employer contends that the administrative law judge erred in finding that the evidence established the existence of complicated pneumoconiosis because the evidence does not show that claimant has a chronic dust disease of the lung, *i.e.*, Drs. Castle, Rosenberg, Spagnolo, and Repsher found that the large mass demonstrated by x-ray evidence did not result from a chronic dust disease of the lung, but was due to a rheumatoid arthritic condition.

First, in determining whether claimant establish a material change in conditions, the administrative law judge considered the new evidence and found that the x-ray and CT scan interpretations of Dr. Alexander were sufficient to satisfy prongs (a) and (c) of Section 718.304 and that claimant established the existence of complicated pneumoconiosis by x-ray evidence showing an opacity greater than one centimeter on x-ray. Decision and Order at 29, 32.<sup>3</sup> The administrative law judge further found, after discussing the medical opinions at length, that there was no affirmative evidence establishing that the opacities seen did not exist or that they were due to another disease process unrelated to claimant=s coal dust exposure. Decision and Order at 32. Accordingly, the administrative law judge found that the new evidence established the existence of complicated pneumoconiosis and therefore established entitlement to the irrebuttable presumption of totally disabling pneumoconiosis and thereby a material change in conditions.

Turning to the merits of the claim, the administrative law judge reviewed all the evidence of record and concluded that none of it affirmatively established that claimant did not have opacities greater than one centimeter or that the opacities seen were not the result of coal mine dust exposure. Decision and Order at 32. Accordingly, the administrative law judge found that the existence of complicated pneumoconiosis and entitlement to the irrebuttable presumption of totally disabling pneumoconiosis were established based on the record as a whole. In addition, the administrative law judge relied on the opinion of Dr. Green, which she found to be well-reasoned and documented, and found that claimant=s pneumoconiosis arose out of coal mine employment since there was no other explanation for the presence of the coal dust, found by Dr. Green, that resulted in the development of claimant=s rheumatoid pneumoconiosis. 20 C.F.R. ' 718.203(c); Decision and Order at 33. The administrative law judge, therefore, awarded benefits.

In addressing the medical opinion evidence, the administrative law judge noted that

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<sup>3</sup> Employer has not challenged the administrative law judge=s finding that there was insufficient evidence to satisfy prong (b) of Section 718.304. 20 C.F.R. ' 718.304(a)-(c). That finding is, therefore, affirmed. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

complicated pneumoconiosis is a Congressionally defined condition, which manifests itself with opacities greater than one centimeter. *Scarbro*, 220 F.3d at 257, 22 BLR at 2-103. Thus, whether the disease is referred to as complicated pneumoconiosis, rheumatoid pneumoconiosis or Caplan=s syndrome does not matter. Rather, an opacity greater than one centimeter which would be classified as Category A, B or C in the various classifications for pneumoconiosis establishes complicated pneumoconiosis unless there is affirmative evidence that persuasively establishes either that the opacity does not exist or that it is the result of a disease process unrelated to claimant=s exposure to coal mine dust. 20 C.F.R. ' 718.304. Employer, in this case, concedes that opacities exist, but contends that the medical opinion evidence shows that they are the result of a disease process unrelated to coal mine dust exposure. We disagree.

In considering the medical opinions of record, the administrative law judge noted that the opacities in question were consistent with rheumatoid pneumoconiosis, or Caplan=s syndrome, as diagnosed by Dr. Green. Specifically, the administrative law judge noted that Dr. Green concluded, that claimant had rheumatoid pneumoconiosis, or Caplan=s syndrome, based on tissue which was negative for tuberculosis and fungi, claimant=s history of coal mine employment, the development of rapidly enlarging nodules on claimant=s lungs, claimant=s background of relatively mild simple pneumoconiosis, and claimant=s history of rheumatoid arthritis. Decision and Order at 8. The administrative law judge credited Dr. Green=s opinion because it was well-reasoned and supported by objective medical evidence and based on Dr. Green=s credentials and experience with the syndrome in question.<sup>4</sup>

In considering Dr. Castle=s opinion, the administrative law judge noted that Dr. Castle did not believe the opacities seen were typical of progressive massive fibrosis, but represented rheumatoid pulmonary disease based on claimant=s history of rheumatoid arthritis, the location of the opacities, and the fact that claimant=s lung nodules developed after claimant left the mines. The administrative law judge concluded, however, that Dr. Castle=s opinions were confusing because they appeared to equate the absence of simple pneumoconiosis on biopsy with the absence of rheumatoid pneumoconiosis, while Dr. Green had made clear that Caplan=s syndrome was not synonymous with either simple

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<sup>4</sup> The record shows that Dr. Green is a Board-certified pathologist. He is a professor of pathology at the University of Calgary and head of Autopsy Service of Foothills Hospital, Alberta, Canada. In addition to having conducted extensive research in pulmonology, he has also conducted extensive research in the pathological, radiological, and physiological aspects of pneumoconiosis. Dr. Green has served as Chief of the Pathology Section of the National Institute of Occupational Safety and Health (NIOSH) from 1977 through 1985 and as Acting Branch Chief of NIOSH from 1979 to 1980. He has written extensively on pulmonary and respiratory systems and the effects of coal mine dust on humans and laboratory animals. He has also coauthored a textbook on the Pathology of Occupational Lung Diseases. Claimant=s Exhibit 1; Claimant=s closing brief before the administrative law judge.

pneumoconiosis or complicated pneumoconiosis in the medical sense of those terms. The administrative law judge concluded that it was impossible to discern from Dr. Castle's opinion precisely what he thought were the characteristic findings of Caplan's syndrome and that he had not adequately explained how the circumstances of this case indicated that the process shown on claimant's x-ray and CT scan were most likely rheumatoid lung disease. Thus, the administrative law judge found that Dr. Castle's opinion did not affirmatively show that those opacities seen on claimant's x-rays as greater than one centimeter were the result of a disease process unrelated to claimant's coal mine dust exposure. This was rational. *Scarbro*, 220 F.3d at 256, 22 BLR 2-101; *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989)(*en banc*); see *Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 532 n.9, 21 BLR 2-323, 2-335 n.9 (4th Cir. 1998).

Regarding the opinions of Dr. Rosenberg, Spagnolo, and Repsher, the administrative law judge noted that these doctors acknowledged the presence of large masses in the claimant's lungs, although they did not agree with Dr. Green that they were due to Caplan's syndrome or rheumatoid pneumoconiosis. The administrative law judge found, however, that their opinions did not counter Dr. Green's findings as Dr. Green was the pathologist who had actually examined the tissue and he was the physician with the most experience with the condition diagnosed. The administrative law judge further noted that Drs. Rosenberg, Spagnolo, and Repsher had not reviewed any x-ray or CT scan evidence, but had merely reviewed the medical reports of other physicians. Accordingly, we affirm the administrative law judge's finding that their opinions have not established that the opacities seen on claimant's x-ray were the result of a disease process unrelated to exposure to coal mine dust. *Scarbro*, 220 F.3d at 256, 22 BLR at 2-101; see *Hicks*, 138 F.3d at 532 n.9, 21 BLR at 2-335 n.9; *Clark*, 12 BLR at 1-155. Employer's argument is tantamount to a request that we reweigh the evidence, which we cannot do. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 113 (1989).

Employer next asserts that the administrative law judge erred in discounting the x-ray readings of Drs. Wheeler and Patel because they did not categorize the opacities they observed as Category A, B, or C as required under the ILO classification system. Employer contends, however, that the ILO system does not require all changes in excess of one centimeter to be classified as a Category A lesion on the ILO classification system, rather only lesions consistent with pneumoconiosis need to be so classified. Thus, employer contends that because Dr. Wheeler, a radiologist, and other pulmonary experts determined that there was insufficient reason to conclude that claimant's radiographic changes in excess of one centimeter were due to coal workers' pneumoconiosis, the x-rays did not have to be classified as Category A, B, or C.

In addressing the report of Dr. Wheeler, who had reviewed newly submitted x-rays and found them uniformly negative for the existence of pneumoconiosis, the administrative law judge noted that she placed diminished reliance on his opinion. Specifically, the administrative law judge noted that all of the physicians who had reviewed x-rays and/or

medical records agreed that there were very large masses in claimant=s upper and right mid lungs, but disagreed as to what the masses represented. The administrative law judge accorded diminished weight to Dr. Wheeler=s interpretation of the x-rays because Dr. Wheeler stated that he was quite sure that he was seeing granulomatous disease, either histoplasmosis or tuberculosis, but had not reviewed any of the pathology reports and was unaware that Dr. Green, a pathologist, had ruled out tuberculosis. Likewise, the administrative law judge accorded diminished weight to Dr. Wheeler=s interpretation since he ruled out pneumoconiosis on the basis that pneumoconiosis could not develop or progress without ongoing coal dust exposure, contrary to the well-established concept of pneumoconiosis as a latent and progressive disease, *see* 20 C.F.R. '718.201. Finally, the administrative law judge accorded diminished weight to Dr. Wheeler=s report because he had never seen a case of Caplan=s syndrome, as diagnosed by Dr. Green, and doubted that such a syndrome existed. The administrative law judge noted, however, that Caplan=s syndrome is documented in published literature and the fact that Dr. Wheeler had never seen it did not mean it did not exist, but rather, underscored Dr. Wheeler=s total lack of experience with such a condition. Thus, the administrative law judge rejected Dr. Wheeler=s findings as they did not provide affirmative evidence that the opacities seen on claimant=s lungs were due to a disease process unrelated to coal mine employment.

Regarding Dr. Manu Patel=s findings, the administrative law judge noted that Dr. Patel found a 7.5 by 3 cm mass in claimant=s lung on the October 9, 2000 x-ray, but did not classify the opacity as Category A, B, or C as required. Dr. Patel noted that he believed the mass was suspicious for neoplasia or mesothelioma. The administrative law judge concluded, however, that Dr. Patel=s finding was sufficient to show that the opacity seen on claimant=s lung was due to a disease process unrelated to pneumoconiosis. Contrary to employer=s argument, the administrative law judge did not find the opinions of Drs. Wheeler and Patel insufficient to establish that the opacities seen on claimant=s x-ray were due to a disease process unrelated to coal mine employment because they had not classified the opacity seen as Category A, B, or C, but because she did not find their opinions, that the opacities seen were the result of another disease process, reasoned. This was permissible. *See Clark*, 12 BLR at 1-155; *Anderson*, 12 BLR at 1-113.

Employer also contends that the administrative law judge erred in shifting the burden of proof from claimant to employer when she stated that there was no affirmative evidence that the changes seen on x-ray were due to a disease process unrelated to coal dust exposure. As claimant responds, however, the administrative law judge is not impermissibly shifting the burden of proof; she is merely mirroring the language of the Fourth Circuit in *Scarbro*, which held that Ax-ray evidence can lose force only if other evidence affirmatively shows that the opacities are not there or are not what they seem to be[.]@ [emphasis added]. *Scarbro*, 220 F.3d at 256, 22 BLR at 2-101. Employer=s argument is, therefore, rejected.

Employer further argues that the administrative law judge has failed to determine whether claimant, who has only eight years of coal mine employment, has affirmatively

established that his pneumoconiosis arose out of coal mine employment. Employer contends that even if the administrative law judge were to find Dr. Green=s opinion to be credible, contrary conclusions by equally qualified specialists affirmatively show that a preponderance of the evidence cannot be found to establish that pneumoconiosis arose out of coal mine employment pursuant to Section 718.203(c). First, contrary to employer=s argument, the administrative law judge found that the well-reasoned and documented reports of Dr. Green established that claimant=s rheumatoid pneumoconiosis was due to the presence of coal dust in the miner=s lungs and that no other explanation had been provided for the presence of the coal dust. Accordingly, because the administrative law judge credited the opinion of Dr. Green and found that the evidence of record failed to counter Dr. Green=s finding, claimant had affirmatively established that his pneumoconiosis arose out of coal mine employment. Decision and Order at 33; *see* 20 C.F.R. ' 718.203(c); *Shoup v. Director, OWCP*, 11 BLR 1-110 (1987). Employer does not refer to any specific evidence which counters Dr. Green=s finding. *See generally Fish v. Director, OWCP*, 6 BLR 1-107, 1-109 (1983).

Finally, employer argues that the administrative law judge erred in finding the onset date of benefits in this duplicate claim to be October 1998, a date that predates the November 1998 denial of benefits of the prior claim. Employer argues that, in a duplicate claim, benefits cannot predate the denial of benefits in the prior claim as such a determination would violate the concept of *res judicata*, *i.e.*, that a prior decision is final, and would suggest that a mistake in a determination of fact had been made, an option available in modification requests but not in duplicate claims.

The prior claim for benefits was denied on November 4, 1998. Thus, even though the administrative law judge found that the first date of evidence showing the existence of complicated pneumoconiosis was in October of 1998, *see Williams v. Director, OWCP*, 13 BLR 1-28 (1989), because this claim is a duplicate claim, benefits cannot be awarded from a date which predates the date of the denial of the prior claim. *See Lisa Lee Mines v. Director, OWCP [Rutter]*, 86 F.3d 1358, 1360, 20 BLR 2-227, 2-232-233 (4th Cir. 1996). Thus, the administrative law judge=s onset date determination is vacated, and the case is remanded for the administrative law judge to determine the proper date of onset.

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

SO ORDERED.

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ROY P. SMITH  
Administrative Appeals Judge

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REGINA C. McGRANERY  
Administrative Appeals Judge

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BETTY JEAN HALL  
Administrative Appeals Judge