BRB No. 12-0409 BLA

GARY N. VANCE	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
SPRING RIDGE COAL COMPANY, INCORPORATED	)	
	)	
and	)	
	)	DATE ISSUED: 04/19/2013
LIBERTY MUTUAL INSURANCE COMPANY	)	
	)	
Employer/Carrier-Petitioners	)	
	)	
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.

John R. Sigmond (Penn, Stuart & Eskridge), Bristol, Virginia, for employer.

Jeffrey S. Goldberg (M. Patricia Smith, Solicitor of Labor; Rae Ellen James, 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.

PER CURIAM:

Employer appeals the Decision and Order (2010-BLA-5513) of Administrative Law Judge Richard T. Stansell-Gamm rendered on a request for modification of the denial of a miner's subsequent claim filed pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (Supp. 2011) (the Act). This claim is claimant's third. Claimant's prior claim, filed on March 9, 2005, was finally denied on November 14, 2005, because claimant failed to establish any element of entitlement. Director's Exhibit 2. Claimant filed his current claim on September 8, 2008. Director's Exhibit 4.

In a Proposed Decision and Order issued on March 31, 2009, the district director found that the medical evidence developed since the denial of the prior claim did not establish the existence of pneumoconiosis, and he denied benefits pursuant to 20 C.F.R. §725.309(d) . Director's Exhibit 26. Claimant timely requested modification pursuant to 20 C.F.R. §725.310, and submitted additional medical evidence. Director's Exhibits 28, 29. The district director granted modification and awarded benefits. Director's Exhibit 40. Employer requested a hearing, which was held on March 15, 2011.

In a Decision and Order issued on March 29, 2012, the administrative law judge credited claimant with at least twenty years of underground coal mine employment.[1] The administrative law judge found that the evidence submitted on modification, considered with the evidence originally submitted in the subsequent claim, established that claimant suffers from complicated pneumoconiosis and therefore, established invocation of the irrebuttable presumption of total disability due to pneumoconiosis pursuant to 20 C.F.R. §718.304. The administrative law judge determined that claimant established a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309(d), and a mistake in a determination of fact in the prior denial of benefits, pursuant to 20 C.F.R. §725.310. The administrative law judge further found that claimant was entitled to the presumption that his complicated pneumoconiosis arose out of his coal mine employment pursuant to 20 C.F.R. §718.203(b), and that employer did not rebut the presumption. Accordingly, the administrative law judge awarded benefits.[2]

On appeal, employer asserts that the administrative law judge erred in his analysis of the analog and digital x-rays, and the medical opinion evidence, in finding that

[1] The Board will apply the law of the United States Court of Appeals for the Fourth Circuit, as claimant was last employed in the coal mining industry in Virginia. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989) (en banc); Director's Exhibit 5.

[2] Because the administrative law judge awarded benefits under 20 C.F.R. §718.304, he did not reach the issue of whether a recent amendment to the Act affected this case. *See* Pub. L. No. 111-148, §1556(a), (c); 30 U.S.C. §921(c)(4).

claimant invoked the irrebuttable presumption of total disability due to pneumoconiosis.[3] Employer also asserts that the administrative law judge erred in relying on an inadmissible medical article to discredit the opinions of its medical experts. Claimant has not submitted a brief in this appeal. The Director, Office of Workers' Compensation Programs, has filed a limited response, agreeing with employer's contention that the administrative law judge erred in relying on the article, but asserting that this error may be harmless, as the administrative law judge provided additional reasons for his credibility determinations.

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).

In order to establish entitlement to benefits in a living miner's claim pursuant to 20 C.F.R. Part 718, claimant must establish 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. 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 claimant did not establish any element of entitlement. Director's Exhibit 1. Consequently, to obtain review of the merits of his current claim, claimant had to submit new evidence establishing an element of entitlement. 20 C.F.R. §725.309(d)(2),(3). Additionally, because claimant requested modification of the denial of his subsequent claim for failure to satisfy the requirements of 20 C.F.R. §725.309(d), the issue before the administrative law judge was whether the new evidence submitted on modification, considered along with the evidence originally submitted in the subsequent claim, established a change in an applicable condition of entitlement. *See* 20 C.F.R. §725.309(d); *Hess v. Director, OWCP*, 21 BLR 1-141, 143 (1998).

[3] Employer does not challenge the administrative law judge's finding that claimant's complicated pneumoconiosis arose out of coal mine employment, pursuant to 20 C.F.R. §718.203(b). That finding is therefore affirmed. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

Section 411(c)(3) of the Act, 30 U.S.C. §921(c)(3), implemented by 20 C.F.R. §718.304, provides that there is an irrebuttable presumption of total disability due to pneumoconiosis if 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) 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 that 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 has held that, "[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. *E. 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). In determining whether claimant has established invocation of the irrebuttable presumption of total disability due to pneumoconiosis pursuant to 20 C.F.R. §718.304, the administrative law judge must weigh together all of the evidence relevant to the presence or absence of complicated pneumoconiosis. *Lester v. Director, OWCP*, 993 F.2d 1143, 1145-46, 17 BLR 2-114, 2-117 (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).

Employer initially asserts that the administrative law judge erred in his evaluation of the analog x-ray evidence relevant to the existence of complicated pneumoconiosis. Employer's Brief at 3-4. Pursuant to 20 C.F.R. §718.304(a), the administrative law judge considered eleven readings of five analog x-rays dated October 16, 2008, January 20, 2009, February 18, 2009, September 27, 2010, and February 14, 2011, and considered the readers' radiological qualifications.[4] Decision and Order at 10-14. The administrative

[4] Drs. DePonte and Miller, both Board-certified radiologists and B readers, read the October 16, 2008 x-ray as positive for both simple pneumoconiosis, and a large opacity, Category B. Director's Exhibits 13, 28. Dr. Wheeler, who possesses the same radiological qualifications, read the same x-ray as negative for pneumoconiosis. Director's Exhibit 15. Dr. Miller read the January 20, 2009 x-ray as positive for both simple pneumoconiosis and a Category A large opacity. Claimant's Exhibit 1. Dr. Wheeler read the same x-ray as negative for pneumoconiosis. Director's Exhibit 16. Dr. Miller read the February 18, 2009 x-ray as positive for both simple pneumoconiosis and a Category A large opacity, Director's Exhibit 28, while Dr. Scott, a Board-certified radiologist and B reader, read the same x-ray as positive for simple pneumoconiosis, but negative for a large opacity. Director's Exhibit 30. Dr. Alexander, a Board-certified radiologist and B reader, read the September 27, 2010 x-ray as positive for both simple

law judge found that the October 16, 2008 and January 20, 2009 x-rays were positive for complicated pneumoconiosis,[5] while the interpretations of the February 18, 2009, September 27, 2010, and February 14, 2011 x-rays were "in equipoise." Decision and Order at 13-14. The administrative law judge concluded that the preponderance of the probative x-rays was positive for the existence of complicated pneumoconiosis.

Employer does not challenge the administrative law judge's determinations that two of the x-rays are positive for complicated pneumoconiosis, and that three of the x-rays are inconclusive for the presence of large opacities. Rather, employer contends that the administrative law judge erred in concluding that the preponderance of the x-rays is positive for complicated pneumoconiosis, when three of the five x-rays, including the three most recent x-rays, do not establish the existence of complicated pneumoconiosis. Employer's Brief at 4. We disagree.

The administrative law judge did not find the three most recent x-rays to be negative for the existence of large opacities. Rather, the administrative law judge found, and employer does not dispute, that the three most recent x-rays were inconclusive for the presence of large opacities, and, therefore, did not constitute probative evidence either for, or against, the existence of complicated pneumoconiosis. *See Director, OWCP v. Greenwich Collieries* [*Ondecko*], 512 U.S. 267, 18 BLR 2A-1 (1994); *Adkins v. Director, OWCP*, 958 F.2d 49, 52-53, 16 BLR 2-61, 2-66 (4th Cir. 1992). Decision and Order at 13-14. Thus, contrary to employer's arguments, as the remaining x-rays are positive for the presence of large opacities, the administrative law judge permissibly concluded that "the preponderance of the probative chest x-ray evidence" established the existence of complicated pneumoconiosis. *See Adkins*, 958 F.2d at 52-53, 16 BLR at 2-66; Decision

---

pneumoconiosis and a Category A large opacity, Claimant's Exhibit 5, while Dr. Wheeler read the same x-ray as negative for pneumoconiosis. Employer's Exhibit 1. Finally, Dr. Miller read the February 14, 2011 x-ray as positive for both simple pneumoconiosis and a Category A large opacity, Claimant's Exhibit 4, while Dr. Wheeler read the same x-ray as negative for pneumoconiosis. Employer's Exhibit 5.

[5] In making this finding, the administrative law judge discounted Dr. Wheeler's negative readings of the October 16, 2008 and January 20, 2009 x-rays because Dr. Wheeler commented that claimant is young, while dust control standards for coal mines have been in place since the early 1970s. Decision and Order at 12-13; Director's Exhibits 15, 16. The administrative law judge found that this comment suggested that Dr. Wheeler's opinion was based on a general assumption that claimant did not experience significant coal mine dust exposure during his twenty years as an underground miner. Decision and Order at 12-13.

and Order at 14. As employer raises no other arguments relevant to the administrative law judge's weighing of the analog x-ray evidence, we affirm the administrative law judge's finding that claimant established the existence of complicated pneumoconiosis pursuant to 20 C.F.R. §718.304(a).[6]

Employer next challenges the administrative law judge's consideration of the digital x-ray evidence, at 20 C.F.R. §718.304(c).[7] The digital x-ray evidence of record consists of interpretations by Drs. Wheeler and Alexander of a digital x-ray taken on October 19, 2009. Decision and Order at 15. The digital x-ray was taken in conjunction with Dr. Hippensteel's medical examination, at the request of employer. Director's Exhibit 37. Dr. Wheeler read the x-ray as negative for pneumoconiosis, Director's Exhibit 37, while Dr. Alexander interpreted the x-ray as positive for both simple pneumoconiosis and a Category B large opacity. Claimant's Exhibit 2. The administrative law judge properly noted that digital x-rays constitute "other medical evidence," the admissibility of which is governed by 20 C.F.R. §718.107. *Webber v. Peabody Coal Co.*, 23 BLR 1-123, 1-135 (2006)(en banc)(Boggs, J., concurring), *aff'd on recon.*, 24 BLR 1-1, 1-7-8 (2007)(en banc); Decision and Order at 15 n.18. The administrative law judge further correctly noted that, pursuant to 20 C.F.R. §718.107(b), an administrative law judge must determine, on a case-by-case basis, whether the proponent of the digital x-ray evidence has established that it is medically acceptable and relevant to entitlement. *See Webber*, 23 BLR at 1-133; Decision and Order at 15 n.18. Noting that employer submitted a statement from Dr. Scatarige that digital x-rays are medically acceptable and useful in diagnosing lung disease, the administrative concluded that the October 19, 2009 digital x-ray was medically acceptable and relevant, and that, therefore, the readings of the film were admissible, pursuant to 20 C.F.R. §718.107. Decision and Order at 15 n.18. Weighing the conflicting interpretations, the

[6] The administrative law judge correctly found that the record contains no biopsy evidence for consideration pursuant to 20 C.F.R. §718.304(b). Decision and Order at 14.

[7] The administrative law judge also considered, at 20 C.F.R. §718.304(c), the results of a histoplasmosis and tuberculosis test, and the results of several pulmonary function and blood gas studies. The administrative law judge found that the results of the histoplasmosis and tuberculosis tests were negative, and thus, did not undermine the x-ray evidence of record. Decision and Order at 18. The administrative law judge also found that the preponderance of the pulmonary function and blood gas studies did not establish total disability, but since the statutory and regulatory definitions of complicated pneumoconiosis do not require the presence of a respiratory impairment, he determined that those tests did not undermine the positive x-ray evidence of a large opacity. Decision and Order at 17-18. As employer does not challenge these determinations, they are affirmed. *See Skrack*, 6 BLR at 1-711.

administrative law judge discounted Dr. Wheeler's negative reading, and credited Dr. Alexander's positive reading, to conclude that the October 19, 2009 x-ray was positive for the presence of a large opacity, and, therefore, supported the analog x-ray evidence of complicated pneumoconiosis.[8] Decision and Order at 15-16.

Employer contends that the administrative law judge erred in considering Dr. Scatarige's statement as to the medical acceptability and relevancy of digital x-rays. Employer's Brief at 4-5. Employer asserts that, because Dr. Scatarige's own reading of a different x-ray was excluded, as in excess of the evidentiary limitations at 20 C.F.R. §725.414, the administrative law judge erred in relying on the "statement on Dr. Scatarige's report" to admit the digital x-ray interpretations by Drs. Wheeler and Alexander, pursuant to 20 C.F.R. §718.107. Employer's Brief at 5. We disagree. Contrary to employer's contention, Dr. Scatarige's statement concerning the acceptability of digital x-rays was not contained in his excluded x-ray report. It was contained in a June 30, 2009 letter, which was admitted into evidence as one of several documents contained in Director's Exhibit 30, and which was not excluded from the record. Decision and Order at 3. Moreover, Dr. Hippensteel's November 25, 2009 medical report, which was properly admitted into the record, contains Dr. Hippensteel's substantially similar attestation to the medical acceptability and relevancy of digital x-rays, and the attestation is uncontradicted. Director's Exhibit 37. We, therefore, affirm the administrative law judge's admission of Dr. Alexander's and Dr. Wheeler's interpretations of the October 19, 2009 digital x-ray, pursuant to 20 C.F.R. §718.107(b). *See Webber*, 23 BLR at 1-133. As employer raises no other challenge to the administrative law judge's consideration of the digital x-ray readings, we affirm his determination that the credible digital x-ray evidence is positive for the existence of a large opacity of complicated pneumoconiosis.

The administrative law judge next considered the medical opinions of Drs. Agarwal, Owens, Rosenberg, and Hippensteel.[9] Decision and Order at 9-12. Drs. Agarwal and Owens diagnosed complicated pneumoconiosis. Director's Exhibit 13; Claimant's Exhibit 3. In contrast, Drs. Rosenberg and Hippensteel opined that claimant

[8] The administrative law judge again discounted Dr. Wheeler's negative reading as based, in part, on his generalization that due to claimant's young age and the controlled dust levels since the 1970s, claimant did not experience significant coal mine dust exposure during his twenty years as an underground miner. Decision and Order at 15.

[9] The administrative law judge also considered, but discounted, the opinions of claimant's treating physicians, Drs. Roatsey and Augustine, that claimant suffers from complicated pneumoconiosis, for reasons that we need not discuss to resolve employer's appeal. Decision and Order at 22; Director's Exhibit 28; Claimant's Exhibit 3.

does not have complicated pneumoconiosis. Director's Exhibits 14, 37; Employer's Exhibits 1-3. The administrative law judge credited the opinions of Drs. Agarwal and Owens, as reasoned and documented, and discounted the opinions of Drs. Rosenberg and Hippensteel, to conclude that the medical opinion evidence supports, and does not undermine, the x-ray evidence of complicated pneumoconiosis. Decision and Order at 24.

Employer contends that the administrative law judge erred in considering the opinions of Drs. Agarwal and Owens pursuant to 20 C.F.R. §718.304(c). Employer contends that Dr. Agarwal's opinion is based solely on an x-ray reading and history of dust exposure, and thus, is merely a restatement of an x-ray reading. Employer's Brief at 5-6. Employer asserts that Dr. Owens's opinion is based on an x-ray reading that is not contained in the record and, therefore, is undocumented. Employer's Brief at 6-7. Employer's contentions lack merit. Substantial evidence supports the administrative law judge's discretionary determination that Drs. Agarwal and Owens provided reasoned and documented opinions diagnosing complicated pneumoconiosis. *See Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 533, 21 BLR 2-323, 2-335 (4th. Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 441, 21 BLR 2-269, 2-275-76 (4th Cir. 1997). X-rays provide the "benchmark" for determining whether statutory complicated pneumoconiosis is present. *Scarbro*, 220 F.3d at 255, 22 BLR at 2-100. Thus, the administrative law judge did not err in finding medical reports that were based primarily on claimant's positive x-ray findings, and which were consistent with the preponderance of the probative x-ray evidence, to be reasoned. Decision and Order at 22-23. In addition, contrary to employer's suggestion that the opinion of Dr. Agarwal is merely a restatement of an x-ray reading, Dr. Agarwal considered other factors as well.[10] *See Hicks*, 138 F.3d at 532, 21 BLR at 2-334; *Akers*, 131 F.3d at 441-42, 21 BLR at 2-274-76; Decision and Order at 19, 22; Director's Exhibit 13. Nor is there merit to employer's assertion that Dr. Owens's opinion was "based upon a reading of an October 19, 2009 chest x-ray . . . that was not submitted into evidence." Employer's Brief at 6-7. Dr. Owens's report reflects that he did not read the October 19, 2009 x-ray himself, but "reviewed [a] B-reading [chest x-ray] report dated October 19, 2009." Claimant's Exhibit 3. Dr. Alexander's

[10] The administrative law judge found that, in reaching his diagnosis, Dr. Agarwal performed a complete pulmonary evaluation, which included a chest x-ray, a pulmonary function study reflecting a severe pulmonary impairment, a blood gas study, an electrocardiogram, and a physical examination, and considered that claimant mined coal for twenty years and never smoked cigarettes. Director's Exhibit 13.

reading of the October 19, 2009 x-ray, which Dr. Owens appears to have reviewed, was properly submitted into evidence by claimant.[11] Claimant's Exhibit 2.

Employer next argues that the administrative law judge erred in relying on an article from the National Library of Medicine, placed in the record by the district director, to discount the medical opinions of Drs. Rosenberg and Hippensteel that claimant does not have complicated pneumoconiosis, but suffers from sarcoidosis. Employer's Brief at 7. We need not address this argument. The administrative law judge provided two other, independent reasons for discounting the opinions of Drs. Rosenberg and Hippensteel, which are not challenged by employer. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

First, the administrative law judge permissibly discounted the opinions of Drs. Rosenberg and Hippensteel because they both relied on a negative chest x-ray to conclude that claimant does not have complicated pneumoconiosis, contrary to the administrative law judge's finding that the x-rays establish the presence of large opacities. *See Akers*, 131 F.3d at 441, 21 BLR at 2-274; Decision and Order at 23-24. Second, the administrative law judge discounted the opinions of Drs. Rosenberg and Hippensteel because both physicians opined that claimant did not have sufficient evidence of a pulmonary impairment to justify a diagnosis of complicated pneumoconiosis, which the administrative law judge properly found is not a factor required to establish the existence of statutory complicated pneumoconiosis. *Scarbro*, 220 F.3d at 257, 22 BLR at 2-103; *see* 30 U.S.C. §921(c)(3); 20 C.F.R. §718.304(a), (c); Decision and Order at 23-24. Because the administrative law judge provided valid, alternative reasons for his determination that the opinions of Drs. Rosenberg and Hippensteel do not undercut either the positive x-ray evidence, or the other medical opinion evidence, that claimant has complicated pneumoconiosis, we need not determine whether the administrative law judge erred in relying, in part, on the article excerpts submitted by the district director. *See Kozele v. Rochester & Pittsburgh Coal Co.*, 6 BLR 1-378, 1-382 n.4 (1983). Therefore, we affirm the administrative law judge's finding that "the probative medical opinion evidence does not . . . outweigh the chest x-ray evidence of a large pulmonary mass consistent with pneumoconiosis." Decision and Order at 24.

Weighing together all of the evidence under 20 C.F.R. §718.304(a), (c), the administrative law judge found that the preponderance of the evidence establishes the presence of a large pulmonary opacity, and the existence of complicated pneumoconiosis. Decision and Order at 24, 27. As employer raises no other challenges to the administrative law judge's evaluation of the evidence, we affirm the administrative law

[11] Dr. Alexander's October 19, 2009 ILO form bears the stamp of Stone Mountain Health Services, where Dr. Owens is employed. Claimant's Exhibits 2, 3.

judge's finding that claimant invoked the irrebuttable presumption of total disability due to pneumoconiosis at 20 C.F.R. §718.304. *See Scarbro*, 220 F.3d at 255, 22 BLR at 2-100. We also affirm the determination that claimant demonstrated both a change in an applicable condition of entitlement, and a mistake in a determination of fact in the prior denial of benefits, pursuant to 20 C.F.R. §§725.309(d), 725.310, and we further affirm the award of benefits.

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

SO ORDERED.

_____
ROY P. SMITH
Administrative Appeals Judge

_____
REGINA C. McGRANERY
Administrative Appeals Judge

_____
BETTY JEAN HALL
Administrative Appeals Judge