



BRB No. 14-0290 BLA

JOHNNY M. McCARTY	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
U.S. STEEL MINING COMPANY	)	DATE ISSUED: 04/28/2015
	)	
and	)	
	)	
U.S. STEEL PENSION FUND	)	
	)	
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 Awarding Benefits of Theresa C. Timlin, Administrative Law Judge, United States Department of Labor.

Joseph E. Wolfe (Wolfe Williams Rutherford & Reynolds), Norton, Virginia, for claimant.

Howard G. Salisbury, Jr. (Kay, Casto & Chaney PLLC), Charleston, West Virginia, for employer.

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

PER CURIAM:

Employer appeals the Decision and Order Awarding Benefits (2011-BLA-05308) of Administrative Law Judge Theresa C. Timlin, rendered on a request for modification of the denial of a subsequent claim, filed on March 5, 2003, pursuant to the provisions of

the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2012) (the Act).<sup>1</sup> This case is before the Board for the third time.<sup>2</sup> In our 2009 Decision and Order, we considered employer's appeal of Administrative Law Judge Alice M. Craft's award of benefits on remand. *J.M. [McCarty] v. U.S. Steel Mining Co.*, BRB No. 08-0616 BLA (May 20, 2009 (unpub.)). We held, as a matter of law, that the evidence submitted was insufficient to establish invocation of the irrebuttable presumption of total disability due to pneumoconiosis at 20 C.F.R. §718.304, and affirmed Judge Craft's finding that the evidence of record was also insufficient to establish total respiratory disability pursuant to 20 C.F.R. §718.204(b)(2). *Id.* at 6-7. Consequently, we reversed the administrative law judge's finding of complicated pneumoconiosis at 20 C.F.R. §718.304, and reversed the award of benefits. *Id.* at 7.

On January 22, 2010, claimant requested modification under 20 C.F.R. §725.310, and submitted additional medical evidence. Director's Exhibit 89. The district director

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<sup>1</sup> Claimant filed his first claim for benefits on May 18, 1994. Director's Exhibit 1-1. The district director denied the claim because claimant did not establish the existence of pneumoconiosis or that he had a totally disabling respiratory impairment due to pneumoconiosis. Director's Exhibit 1-27. Claimant subsequently requested a formal hearing before an administrative law judge, but did not appear at the hearing. February 11, 1999 Hearing Transcript at 3. Administrative Law Judge Edward Terhune Miller issued an order on April 8, 1999, dismissing the miner's claim due to his "unexcused failure to appear at a scheduled hearing and for failure to prosecute." Order of Dismissal dated April 8, 1999. Claimant took no further action on this claim, but filed the present subsequent claim on March 5, 2003.

<sup>2</sup> Administrative Law Judge Alice M. Craft issued a Decision and Order on July 11, 2006, in which she awarded benefits, based on her finding that claimant established invocation of the irrebuttable presumption of total disability due to pneumoconiosis at 20 C.F.R. §718.304, by proving that he has complicated pneumoconiosis. Pursuant to employer's appeal, the Board vacated Judge Craft's findings under 20 C.F.R. §718.304(a), (c) and remanded the case for reconsideration. *McCarty v. U.S. Steel Mining Co.*, BRB No. 06-0818 BLA, slip op. at 6 (May 24, 2007) (unpub.). On remand, Judge Craft again determined that claimant established the existence of complicated pneumoconiosis at 20 C.F.R. §718.304(c). Judge Craft also determined that the evidence, when weighed together, was sufficient to establish invocation of the irrebuttable presumption of total disability due to pneumoconiosis pursuant to 20 C.F.R. §718.304. Judge Craft further found that claimant's complicated pneumoconiosis arose out of his coal mine employment under 20 C.F.R. §718.203(b). Accordingly, Judge Craft awarded benefits and employer's appeal, which was the subject of the Board's 2009 Decision and Order, followed.

granted modification, and awarded benefits. Director's Exhibit 100. Employer requested a hearing, which was held on June 12, 2012. Director's Exhibit 101. In a Decision and Order issued on April 15, 2014, Judge Timlin (the administrative law judge) credited claimant with twenty-three years of coal mine employment and adjudicated this subsequent claim pursuant to 20 C.F.R. Part 718.<sup>3</sup> The administrative law judge found that the evidence submitted on modification, considered with the evidence originally submitted in the subsequent claim, was sufficient to prove that claimant suffers from complicated pneumoconiosis, thereby establishing invocation of the irrebuttable presumption of total disability due to pneumoconiosis pursuant to 20 C.F.R. §718.304; a change in an applicable condition of entitlement at 20 C.F.R. §725.309(c); and a change in conditions since the prior denial of benefits at 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, commencing as of January 2010, the month and year in which claimant filed his request for modification.

On appeal, employer challenges the award of benefits, arguing that the administrative law judge erred in finding that claimant invoked the irrebuttable presumption at 20 C.F.R. §718.304, and established a change in an applicable condition of entitlement at 20 C.F.R. §725.309, as well as a basis for granting modification pursuant to 20 C.F.R. §725.310. Claimant responds, urging affirmance of the award of benefits. The Director, Office of Workers' Compensation Programs, has declined to file a substantive response brief 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 rational, supported by substantial evidence, and in accordance with applicable law.<sup>4</sup> 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).

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

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<sup>3</sup> The 2010 amendments to the Black Lung Benefits Act do not apply to the present claim, as it was filed before January 1, 2005. 20 C.F.R. §725.1(i); Director's Exhibit 2.

<sup>4</sup> This case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit, as claimant's coal mine employment was in West Virginia. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Director's Exhibit 4.

totally disabling. See 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. When 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(c)(3); *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(c)(3). Because claimant’s 1994 claim was denied for failure to establish the existence of pneumoconiosis and total respiratory or pulmonary disability, he had to submit new evidence proving at least one of these elements in order to obtain a review of the merits of his current claim. See *White*, 23 BLR at 1-3. 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(c); *Hess v. Director, OWCP*, 21 BLR 1-141, 143 (1998).

Under Section 411(c)(3) of the Act, 30 U.S.C. §921(c)(3), and its implementing regulation, 20 C.F.R. §718.304, there is an irrebuttable presumption that a miner is totally disabled due to pneumoconiosis if the miner is suffering from a chronic dust disease of the lung which (A) when diagnosed by x-ray, yields an opacity greater than one centimeter in diameter that would be 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, would be a condition that could reasonably be expected to reveal a result equivalent to (A) or (B). See 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 that 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, 2-115-16 (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).

In this case, the administrative law judge determined that the x-ray and biopsy evidence were insufficient to establish the existence of complicated pneumoconiosis at 20 C.F.R. §718.304(a), (b).<sup>5</sup> Decision and Order at 11-17. The administrative law judge further found, however, that claimant proved that he is suffering from complicated pneumoconiosis at 20 C.F.R. §718.304(c), based on the newly submitted CT scan evidence. *Id.* at 24.

The administrative law judge considered interpretations of CT scans dated November 18, 2002, January 20, 2006, December 5, 2008, July 12, 2010, October 15, 2010, April 26, 2011 and October 25, 2011. With respect to the scan performed on November 18, 2002, Dr. Rahman, whose radiological qualifications are not in the record, observed a 2.5 by 3 centimeter (cm) left lower lobe mass that “likely represents conglomerate mass of progressive massive fibrosis/complicated pneumoconiosis.” Claimant’s Exhibit 2. Dr. Hippensteel, a B reader and Board-certified pulmonologist, also identified several masses on this scan, but did not render an opinion as to whether they represented complicated pneumoconiosis. Employer’s Exhibit 3. Dr. DePonte, who is dually qualified as a Board-certified radiologist and B reader, interpreted the scan as revealing several large opacities, including a mass in the left lower lobe that measured 24 millimeters x 22 millimeters (mm). Claimant’s Exhibit 17. Dr. DePonte indicated that the findings were typical for complicated pneumoconiosis. *Id.*

Dr. Garland, a Board-certified radiologist, interpreted the January 20, 2006 CT scan and reported the presence of several masses, 3 cm or less in size, that were typical of coal workers’ pneumoconiosis, but that could represent a neoplasm. Claimant’s Exhibit 3. Dr. Hippensteel also identified several masses on this CT scan, but did not render an opinion as to whether they represented complicated pneumoconiosis. Employer’s Exhibit 3. Dr. DePonte interpreted the scan as revealing masses in the upper left lobe, upper right lobe and left lower lobe lung, measuring up to 23 mm x 33 mm, that were typical of complicated pneumoconiosis. Claimant’s Exhibit 8.

Dr. Bolen, a Board-certified radiologist, interpreted the December 5, 2008 CT scan and observed several large masses that were likely progressive massive fibrosis related to pneumoconiosis. Claimant’s Exhibits 1, 3. Dr. Hippensteel also identified

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<sup>5</sup> Relevant to 20 C.F.R. §718.304(a), the administrative law judge stated, “the weight of the chest X-ray evidence is more negative than positive. Dr. DePonte is the only dually qualified physician to find chest X-ray evidence of complicated pneumoconiosis.” Decision and Order at 16. Pursuant to 20 C.F.R. §718.304(b), the administrative law judge found that the opinions of Drs. Koss and Naeye, that the results of claimant’s October 5, 1990 biopsy were inconsistent with a diagnosis of complicated pneumoconiosis, did not assist claimant in satisfying his burden of proof. *Id.*

several masses on this scan, but did not render an opinion as to whether they represented complicated pneumoconiosis. Employer's Exhibit 3. Dr. DePonte interpreted the scan as revealing masses in the upper left lobe, upper right lobe and left lower lobe, measuring up to 20 mm x 30 mm, that were typical of complicated pneumoconiosis. Claimant's Exhibit 9.

Dr. Mahtre, a Board-certified radiologist, interpreted the July 12, 2010 CT scan and observed large masses in the upper right lobe and left lower lobe, consistent with claimant's history of pneumoconiosis. Claimant's Exhibit 4. Dr. Hippensteel also identified several masses on this CT scan, noting that the abnormalities had changed significantly since 2008, but opined that the changes were not indicative of the progression of pneumoconiosis. Employer's Exhibit 3. Dr. DePonte interpreted the scan as revealing masses in the upper left lobe, upper right lobe and left lower lobe, measuring up to 20 mm x 30 mm, that were typical of complicated pneumoconiosis or progressive massive fibrosis. Claimant's Exhibit 10.

Dr. Hippensteel identified masses on the October 15, 2010 CT scan, but did not indicate whether they represented complicated pneumoconiosis. Employer's Exhibit 3. Dr. DePonte interpreted the October 15, 2010 CT scan as revealing large opacities of complicated coal workers' pneumoconiosis, which would appear as greater than one centimeter on an x-ray. Claimant's Exhibit 11.

Dr. Hippensteel identified masses on the April 26, 2011 CT scan, but did not state whether they represented complicated pneumoconiosis. Employer's Exhibit 3. Dr. DePonte interpreted this CT scan as revealing large opacities, and diagnosed complicated coal workers' pneumoconiosis. Claimant's Exhibit 12.

Dr. Hippensteel identified masses on the October 25, 2011 CT scan and commented that the densities had "waxed and waned" in size since the 2002 CT scan. Employer's Exhibit 3. Dr. Hippensteel also remarked that this is not consistent with coal workers' pneumoconiosis or complicated pneumoconiosis. *Id.* Dr. DePonte interpreted this CT scan as revealing large opacities, and diagnosed complicated coal workers' pneumoconiosis. Claimant's Exhibit 13.

The administrative law judge accorded the greatest weight to the positive interpretations by Drs. DePonte, Bolen and Mahtre, based upon their superior radiological qualifications, and found that the CT scans dated November 18, 2002, January 20, 2006, December 5, 2008, July 12, 2010, October 15, 2010, April 26, 2011 and October 25, 2011 were positive for complicated pneumoconiosis. Decision and Order at 21-24. Having found that all seven of the newly submitted CT scans were positive for complicated pneumoconiosis, the administrative law judge determined that

claimant established the existence of complicated pneumoconiosis pursuant to 20 C.F.R. §718.304(c). *Id.* at 24.

Employer argues that the administrative law judge erred in crediting Dr. DePonte's positive CT scan interpretations over Dr. Hippensteel's interpretations, based upon Dr. DePonte's superior qualifications.<sup>6</sup> Employer's contention is without merit.

It is within the administrative law judge's discretion as fact-finder to weigh the credibility of the experts, and to determine the persuasiveness of their opinions. *See Island Creek Coal Co. v. Compton*, 211 F.3d 203, 211, 22 BLR 2-162, 2-175 (4th Cir. 2000); *Underwood v. Elkay Mining, Inc.*, 105 F.3d 946, 949, 21 BLR 2-23, 2-31 (4th Cir. 1997); *see also Consolidation Coal Co. v. Director, OWCP [Stein]*, 294 F.3d 885, 893, 22 BLR 2-409, 2-422 (7th Cir. 2002) (In the absence of controlling statutory language or guidance from DOL, an administrative law judge's weighing of CT scan evidence may be accorded deference, unless it is found to be irrational or unlawful). In this case, the administrative law judge acted within her discretion as fact-finder in determining that Dr. Hippensteel's status, as a B reader, gave him "no special credentials for evaluating CT scans." Decision and Order at 22; *see Compton*, 211 F.3d at 211, 22 BLR at 2-175. The administrative law judge also rationally found that, although Dr. Hippensteel is Board-certified in Internal Medicine and Pulmonary Disease, "those qualifications do not evidence a special expertise in interpreting CT scans, comparable to a [B]oard-certified radiologist." *Id.* at 22 n.16; *see Underwood*, 105 F.3d at 949, 21 BLR at 2-31. Consequently, the administrative law judge reasonably determined that Dr. DePonte's qualifications, as a Board-certified radiologist entitled her interpretations to greater weight than Dr. Hippensteel's interpretations. *See* 20 C.F.R. §718.202(a)(1) ("where two or more X-ray reports are in conflict, in evaluating such X-ray reports consideration shall be given to the radiological qualifications of the physicians interpreting such X-rays."); *Compton*, 211 F.3d at 211, 22 BLR at 2-175; *see also Stein*, 294 F.3d at 893-94, 22 BLR at 2-422-23 ("CT scans are typically read by radiologists (some of whom may in addition be classified as B-readers) who have specialized knowledge and have developed a certain expertise through the years of training and experience interpreting this particular test.").

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<sup>6</sup> In regard to Dr. Hippensteel's qualifications, employer notes that "although [Dr. Hippensteel is a NIOSH certified B reader, Dr. Hippensteel is not a radiologist." Employer further states that:

The fact is that, as part of his pulmonology training and certification (culminating in his Board certification in pulmonary diseases), Dr. Hippensteel has gained what he termed "board certified expertise in the interpretation of chest x-rays and chest CT scans."

Employer's Brief at 11, *quoting* Employer's Exhibit 2 at 3, 22-23.

Thus, we affirm the administrative law judge's finding that Dr. DePonte's readings of the newly submitted CT scans were sufficient to establish the existence of complicated pneumoconiosis pursuant to 20 C.F.R. §718.304(c). We further affirm, as unchallenged by employer on appeal, the administrative law judge's determination, based on a weighing of all of the relevant evidence, that claimant invoked the irrebuttable presumption of total disability due to pneumoconiosis at 20 C.F.R. §718.304.<sup>7</sup> See *Lester*, 993 F.2d at 1145-46, 17 BLR at 2-117-18; *Melnick*, 16 BLR at 1-33-34; *Skrack v. Island Creek Coal Co.*, 6 BLR at 1-710, 1-711 (1983); Decision and Order at 33. Finally, we affirm the administrative law judge's findings that claimant established a change in an applicable condition of entitlement at 20 C.F.R. §725.309, and a change in conditions at 20 C.F.R. §725.310.<sup>8</sup> See *White*, 23 BLR at 1-3; *Hess*, 21 BLR at 1-143; Decision and Order at 13, 24, 33.

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<sup>7</sup> The administrative law judge acted within her discretion as fact-finder in giving little weight to Dr. Hippensteel's opinion, that the totality of the CT scan evidence was not consistent with a diagnosis of complicated pneumoconiosis, because he was equivocal as to the presence of simple pneumoconiosis, contrary to the stipulation that employer first made in 2006. See *Island Creek Coal Co. v. Compton*, 211 F.3d 203, 211, 22 BLR 2-162, 2-175 (4th Cir. 2000); Decision and Order at 3; Employer's Exhibit 1.

<sup>8</sup> We note that the administrative law judge did not make a finding of causality pursuant to 20 C.F.R. §718.203, and that employer has not raised this issue. Since we affirm the administrative law judge's findings that claimant established the existence of complicated pneumoconiosis at 20 C.F.R. §718.304, and that claimant had twenty-three years of coal mine employment, the administrative law judge's error is harmless. See *Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984). Under 20 C.F.R. §718.203(b), a miner with more than ten years of coal mine employment benefits from the presumption that his pneumoconiosis was caused by coal mine employment, and that presumption was not rebutted in this case.



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

SO ORDERED.

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BETTY JEAN HALL, Chief  
Administrative Appeals Judge

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REGINA C. McGRANERY  
Administrative Appeals Judge

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JUDITH S. BOGGS  
Administrative Appeals Judge