

BRB No. 04-0783 BLA

WILLIAM H. WILSON	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
WESTMORELAND COAL COMPANY	)	
	)	DATE ISSUED: 06/09/2005
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 Alice M. Craft, Administrative Law Judge, United States Department of Labor.

Joseph E. Wolfe and W. Andrew Delph, Jr. (Wolfe Williams & Rutherford), Norton, Virginia, for claimant.

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

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

PER CURIAM:

Claimant appeals the Decision and Order (2003-BLA-6134) of Administrative

Law Judge Alice M. Craft denying benefits on a subsequent<sup>1</sup> 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). Based on the date of filing, the administrative law judge adjudicated this claim pursuant to 20 C.F.R. Part 718, and credited claimant with 14.05 years of coal mine employment. The administrative law judge found that although claimant established the existence of simple pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.202(a), 718.203(b), he did not establish that he is totally disabled by a respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(b)(2), based on the evidence developed since the prior denial of benefits. Specifically, the administrative law judge found that claimant failed to demonstrate the existence of complicated pneumoconiosis by x-ray and medical opinion evidence, and was therefore ineligible for the irrebuttable presumption of total disability due to pneumoconiosis pursuant to 20 C.F.R. §718.304. The administrative law judge also determined that claimant did not prove that he is totally disabled pursuant to 20 C.F.R. §718.204(b)(2). Because claimant did not establish the total disability element previously decided against him, the administrative law judge found that claimant did not establish a change in an applicable condition of entitlement as required by 20 C.F.R. §725.309(d). Accordingly, the administrative law judge denied benefits.

On appeal, claimant challenges the administrative law judge's finding that the evidence did not establish invocation of the irrebuttable presumption of total disability due to pneumoconiosis pursuant to 20 C.F.R. §718.304. Employer responds, urging affirmance of the denial of benefits. The Director, Office of Workers' Compensation Programs, has filed a letter stating that he will not file a response brief on the merits of this appeal.<sup>2</sup>

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<sup>1</sup> Claimant's initial claim filed on September 1, 1982 was denied on February 4, 1988, based on findings that claimant established the existence of pneumoconiosis but did not establish that he was totally disabled by a respiratory or pulmonary impairment. Director's Exhibit 1. Claimant's second claim filed on June 20, 1991 was denied on September 28, 1993, because claimant did not establish total disability. Director's Exhibits 1, 2. On September 15, 1999, claimant filed a third claim, but later withdrew it and it was therefore considered not to have been filed pursuant to 20 C.F.R. §725.306(b). Decision and Order at 2; Director's Exhibit 3. Claimant filed this current, subsequent claim on April 9, 2001. Director's Exhibit 5.

<sup>2</sup> The parties do not challenge the administrative law judge's decision to credit claimant with 14.05 years of coal mine employment, or her findings that the evidence established the existence of simple pneumoconiosis pursuant to 20 C.F.R. §718.202(a), but did not establish that claimant is totally disabled by a respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(b)(2). Those findings are therefore affirmed. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

The Board's scope of review is defined by statute. If the administrative law judge's findings of fact and conclusions of law are supported by substantial evidence, are rational, and are consistent with applicable law, they are binding upon this Board and may not be disturbed. 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 prove 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. Failure to establish any one of these elements precludes entitlement. *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(*en banc*).

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., Inc.*, 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 by a respiratory or pulmonary impairment. Director's Exhibits 1, 2. Consequently, claimant had to submit new evidence establishing total disability to proceed with his claim. 20 C.F.R. §725.309(d)(2),(3); see also *Lisa Lee Mines v. Director, OWCP [Rutter]*, 86 F.3d 1358, 20 BLR 2-227 (4th Cir. 1996)(*en banc*)(holding under former provision that claimant must establish at least one element of entitlement previously adjudicated against him).

Pursuant to Section 718.304(a), claimant contends that the administrative law judge erred in weighing the x-ray evidence when she found that claimant did not establish the existence of complicated pneumoconiosis and thus was not entitled to the irrebuttable presumption that he is totally disabled due to pneumoconiosis. Claimant asserts that the administrative law judge's finding was based solely on a "mechanical reliance on numerical superiority" of negative readings. Claimant's Brief at 5. We disagree.

Section 411(c)(3)(A) of the Act, implemented by 20 C.F.R. §718.304(a) of the regulations, provides in relevant part 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, 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. 30 U.S.C. §921(c)(3)(A); 20 C.F.R. §718.304(a). When weighing conflicting x-ray readings, the administrative law judge must consider the radiological qualifications of the physicians interpreting the x-rays. 20 C.F.R. §718.202(a)(1); *Adkins v. Director, OWCP*, 958 F.2d

49, 52, 16 BLR 2-61, 2-65-66 (4th Cir. 1992). Additionally, 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 consider 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*).

Contrary to claimant's contention, a review of the administrative law judge's Decision and Order reflects that she did not merely count the negative readings when she weighed the x-ray evidence, but considered the x-ray readings in light of the readers' radiological credentials. The administrative law judge permissibly found the x-ray taken on September 20, 2001 to be in equipoise because it was read as positive for complicated pneumoconiosis by Dr. Patel, a "dually-qualified" board-certified radiologist and B-reader and completely negative for pneumoconiosis by Dr. Wheeler, also a dually-qualified radiologist. Decision and Order at 14; see *Director, OWCP v. Greenwich Collieries [Ondecko]*, 512 U.S. 267, 18 BLR 2A-1 (1994); *Adkins*, 958 F.2d at 52, 16 BLR at 2-65-66; see also *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*). Similarly, the administrative law judge permissibly found that the x-ray taken on May 24, 2002 was in equipoise because it was read as positive for complicated pneumoconiosis by Dr. DePonte, a dually-qualified radiologist, and completely negative for pneumoconiosis by Dr. Wheeler, a similarly qualified radiologist. *Adkins*, 958 F.2d at 52, 16 BLR at 2-65-66. The administrative law judge correctly found that the most recent x-ray taken on June 10, 2003 was read positive for simple pneumoconiosis by all four dually-qualified radiologists, only one of whom also interpreted the x-ray as positive for complicated pneumoconiosis. Decision and Order at 14; Claimant's Exhibit 1; Employer's Exhibits 7, 8. The administrative law judge reasonably found that, because the x-rays that were read as positive for complicated pneumoconiosis were either in equipoise, or were outweighed by reports of dually qualified radiologists who found the presence of only simple pneumoconiosis, the x-ray evidence supported a finding of simple pneumoconiosis. See *Ondecko*, 512 U.S. at 281, 18 BLR at 2A-12; *Adkins*, 958 F.2d at 52, 16 BLR at 2-65-66.

Citing *Scott v. Mason Coal Co.*, 289 F.3d 263, 22 BLR 2-373 (4th Cir. 2002), claimant argues that the administrative law judge erred in considering Dr. Wheeler's negative readings in determining whether complicated pneumoconiosis was present because she effectively credited the opinion of a doctor who did not diagnose pneumoconiosis in her consideration of disability causation. Claimant's contention lacks merit. The administrative law judge had to consider Dr. Wheeler's negative readings on the question of complicated pneumoconiosis. *Lester*, 993 F.2d at 1145-46, 17 BLR at 2-117-18; *Melnick*, 16 BLR at 1-33-34. Claimant's reliance on *Scott*, a case which did not

address the irrebuttable presumption of total disability due to pneumoconiosis, is inapposite.<sup>3</sup>

The administrative law judge additionally found that in reviewing the three medical opinions of record, only Dr. Rasmussen diagnosed complicated pneumoconiosis, while Drs. Castle and McSharry diagnosed simple pneumoconiosis, and there were no biopsy reports to weigh to determine the presence of complicated pneumoconiosis. Decision and Order at 15. These findings are not challenged and are therefore affirmed. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983). We further affirm as rational the administrative law judge's finding that the opinions of Board-certified pulmonologists Drs. Castle and McSharry outweighed that of Dr. Rasmussen based on their credentials, and because their opinions were more consistent with the objective evidence and with the administrative law judge's assessment of the x-ray evidence. *Clark*, 12 BLR at 1-155. We therefore affirm the administrative law judge's finding, based on her consideration of the x-ray and medical opinion evidence together, that claimant failed to establish the existence of complicated pneumoconiosis. *See Melnick*, 16 BLR at 1-33-34.

We have affirmed the administrative law judge's finding that the newly submitted evidence did not establish that claimant is totally disabled pursuant to Section 718.204(b). We therefore affirm the administrative law judge's denial of benefits pursuant to Section 725.309(d) because claimant did not establish that the applicable condition of entitlement has changed since the date of the denial of his prior claim. 20 C.F.R. §725.309(d); *White*, 23 BLR at 1-7.

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<sup>3</sup> In *Scott v. Mason Coal Co.*, 289 F.3d 263, 22 BLR 2-372 (4th Cir. 2002), which addressed the weighing of medical opinions as to the cause of a miner's total disability, the United States Court of Appeals for the Fourth Circuit explained that where an administrative law judge has found the existence of pneumoconiosis arising out of coal mine employment established, and a physician opines that the miner has neither clinical nor legal pneumoconiosis, the administrative law judge may not credit that physician's medical opinion that pneumoconiosis did not cause the miner's disability "unless the [administrative law judge] can and does identify specific and persuasive reasons for concluding that the doctor's judgment" on causation "does not rest upon her disagreement with the [administrative law judge's] finding . . ." *Scott*, 289 F.3d at 269, 22 BLR at 2-384, quoting *Toler v. Eastern Associated Coal Corp.*, 43 F.3d 109, 116, 19 BLR 2-70, 2-83 (4th Cir. 1995).

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

SO ORDERED.

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ROY P. SMITH  
Administrative Appeals Judge

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BETTY JEAN HALL  
Administrative Appeals Judge

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JUDITH S. BOGGS  
Administrative Appeals Judge