BRB No. 11-0774 BLA

MONROE MULLINS	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
SOUTH AKERS MINING COMPANY, LLC	)	
	)	
and	)	
	)	
KENTUCKY EMPLOYERS' MUTUAL INSURANCE	)	DATE ISSUED: 08/01/2012
	)	
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 Stephen M. Reilly, Administrative Law Judge, United States Department of Labor.

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

Paul E. Jones (Jones, Walters, Turner & Shelton PLLC), Pikeville, Kentucky, for employer/carrier.

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

PER CURIAM:

Employer/carrier (employer) appeals the Decision and Order (07-BLA-6012) of Administrative Law Judge Stephen M. Reilly awarding benefits on a claim filed pursuant to the provisions of the Black Lung Benefits Act, 30 U.S.C. §§901-944 (2006), *amended*

by Pub. L. No. 111-148, §1556, 124 Stat. 119 (2010) (to be codified at 30 U.S.C. §§921(c)(4) and 932(*l*)) (the Act). This case involves a subsequent claim filed on July 14, 2006.[1]

After crediting claimant with at least twenty-four years of coal mine employment,[2] the administrative law judge found that the new evidence established the existence of complicated pneumoconiosis pursuant to 20 C.F.R. §718.304, thereby establishing invocation of the irrebuttable presumption of total disability due to pneumoconiosis at 20 C.F.R. §718.304. The administrative law judge, therefore, found that claimant established that one of the applicable conditions of entitlement had changed since the date upon which the denial of claimant's prior claim became final. 20 C.F.R. §725.309. Consequently, the administrative law judge considered claimant's 2006 claim on the merits.

The administrative law judge found that the evidence, as a whole, established invocation of the irrebuttable presumption pursuant to 20 C.F.R. §718.304. The administrative law judge further found that claimant's complicated pneumoconiosis arose out of coal mine employment pursuant to 20 C.F.R. §718.203(b). Accordingly, the administrative law judge awarded benefits.

On appeal, employer contends that the administrative law judge erred in finding that the evidence established the existence of complicated pneumoconiosis pursuant to 20 C.F.R. §718.304. Claimant responds in support of the administrative law judge's award of benefits. The Director, Office of Workers' Compensation Programs, has not filed a response brief.

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).

[1] Claimant's previous claim, filed on September 18, 1985, was denied as abandoned on February 6, 1986. Director's Exhibit 1.

[2] Claimant's last coal mine employment was in Kentucky. Director's Exhibit 4. Accordingly, the Board will apply the law of the United States Court of Appeals for the Sixth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc).

In order to establish entitlement to benefits under 20 C.F.R. Part 718 in a miner's claim, a claimant must establish the existence of pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, and that the pneumoconiosis is totally disabling. 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). In this case, claimant abandoned his prior claim. Director's Exhibit 1. Under the regulations, a denial "by reason of abandonment" is "deemed a finding that the claimant has not established any applicable condition of entitlement." 20 C.F.R. §725.409(c). Thus, claimant had to establish, based on the newly submitted evidence, at least one of the requisite elements of entitlement in order to satisfy his burden of proof at 20 C.F.R. §725.309(d), and obtain a review of his claim on the merits of entitlement. *See White*, 23 BLR at 1-3.

Employer argues that the administrative law judge erred in finding that claimant established that he suffers from complicated pneumoconiosis and, therefore, established invocation of the irrebuttable presumption of total disability due to pneumoconiosis set out at 20 C.F.R. §718.304. 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 one or more opacities 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 yield a result equivalent to (A) or (B). *See* 20 C.F.R. §718.304.

The introduction of legally sufficient evidence of complicated pneumoconiosis does not automatically qualify a claimant for the irrebuttable presumption found at Section 718.304. The administrative law judge must first determine whether the evidence in each category tends to establish the existence of complicated pneumoconiosis, and then must weigh together the evidence at subsections (a), (b), and (c) before determining whether invocation of the irrebuttable presumption pursuant to Section 718.304 has been established. *See Gray v. SLC Coal Co.*, 176 F.3d 382, 21 BLR 2-615 (6th Cir. 1999); *Melnick v. Consolidation Coal Co.*, 16 BLR 1-31 (1991) (en banc).

Employer contends that the administrative law judge erred in finding that the x-ray evidence established the existence of complicated pneumoconiosis pursuant to 20 C.F.R. §718.304(a). In considering the x-ray evidence, the administrative law judge properly

noted that greater weight could be accorded to the x-ray interpretations rendered by physicians with the dual qualifications of B reader and Board-certified radiologist. *See Sheckler v. Clinchfield Coal Co.*, 7 BLR 1-128 (1984); Decision and Order at 12 n.9.

The administrative law judge considered five interpretations of four x-rays taken on October 19, 2006, March 21, 2007, January 29, 2008, and July 27, 2008. Drs. Rasmussen and Dahhan, each a B reader, interpreted the October 19, 2006 and March 21, 2007 x-rays, respectively, as negative for complicated pneumoconiosis. Director's Exhibits 13, 16. Dr. DePonte, a B reader and Board-certified radiologist, interpreted the January 29, 2008 x-ray as negative for complicated pneumoconiosis. Claimant's Exhibit 1. Finally, although Dr. Rosenberg, a B reader, interpreted the July 28, 2008 x-ray as negative for complicated pneumoconiosis, Employer's Exhibit 3, Dr. DePonte, a B reader and Board-certified radiologist, interpreted the x-ray as positive for the disease. Claimant's Exhibit 2.

In considering whether the x-ray evidence established the existence of complicated pneumoconiosis,[3] the administrative law judge accorded the greatest weight to the most recent x-ray of record, the July 28, 2008 x-ray. Decision and Order at 12. The administrative law judge further credited Dr. DePonte's positive interpretation of this x-ray, over Dr. Rosenberg's contrary interpretation, based upon Dr. DePonte's superior radiological qualifications. *Id.* The administrative law judge, therefore, found that the x-ray evidence established the existence of complicated pneumoconiosis pursuant to 20 C.F.R. §718.304(a). *Id.*

We reject employer's contention that the administrative law judge erred in his consideration of the x-ray evidence. In this case, the administrative law judge properly considered the number of x-ray interpretations, along with the readers' qualifications, the dates of the x-rays, and the actual readings. *See Staton v. Norfolk & Western Ry. Co.*, 65 F.3d 55, 59, 19 BLR 2-271, 2-279-80 (6th Cir. 1995); *Woodward v. Director, OWCP*, 991 F.2d 314, 321, 17 BLR 2-77, 2-87 (6th Cir. 1993); *White*, 23 BLR at 1-4-5; *Dixon v. North Camp Coal Co.*, 8 BLR 1-344 (1985). Because it is supported by substantial evidence, we affirm the administrative law judge's finding that the x-ray evidence established the existence of complicated pneumoconiosis pursuant to 20 C.F.R. §718.304(a).

[3] Noting that all five x-ray interpretations are positive for simple pneumoconiosis, the administrative law judge also found that the x-ray evidence established the existence of simple pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1). Decision and Order at 12.

We further reject employer's contention that the administrative law judge failed to consider all relevant probative evidence pursuant to 20 C.F.R. §718.304. The administrative law judge considered the pulmonary function study and arterial blood gas study evidence, as well as the medical opinion evidence,[4] and permissibly found that it did not undermine the x-ray evidence of complicated pneumoconiosis. *Melnick*, 16 BLR at 1-33; Decision and Order at 14. Consequently, we affirm the administrative law judge's finding that claimant was entitled to invocation of the irrebuttable presumption set forth at 20 C.F.R. §718.304.[5] In light of this holding, we also affirm the administrative law judge's finding that claimant established a change in an applicable condition of entitlement under 20 C.F.R. §725.309.

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

SO ORDERED.

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NANCY S. DOLDER, Chief
Administrative Appeals Judge

_____
ROY P. SMITH
Administrative Appeals Judge

_____
BETTY JEAN HALL
Administrative Appeals Judge

[4] The record does not contain any biopsy evidence relevant to the existence of complicated pneumoconiosis pursuant to 20 C.F.R. §718.304(b).

[5] Because employer does not challenge the administrative law judge's finding pursuant to 20 C.F.R. §718.203(b), this finding is affirmed. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).