BRB Nos. 09-0334 BLA
and 09-0334 BLA-A

JAMES CURTIS	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	DATE ISSUED: 12/16/2009
TENNESSEE CONSOLIDATED COAL COMPANY	)	
	)	
	)	
Employer-Respondent Cross-Petitioner	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest Cross-Respondent	)	DECISION and ORDER

Appeal of the Decision and Order Denying Benefits of Paul C. Johnson, Jr., Administrative Law Judge, United States Department of Labor.

James Curtis, Gruetli-Laager, Tennessee, *pro se*.

Ronald E. Gilbertson (K & L Gates LLP), Washington, D.C., for employer.

Barry H. Joyner (Deborah Greenfield, Acting Deputy Solicitor; Rae Ellen Frank 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: DOLDER, Chief Administrative Appeals Judge, SMITH and HALL, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals, without the assistance of counsel,[1] and employer cross-appeals, the Decision and Order Denying Benefits (07-BLA-5660) of Paul C. Johnson, Jr., rendered on a subsequent 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).[2] The administrative law judge credited claimant with fourteen years of coal mine employment,[3] and found that employer was properly designated as the responsible operator. Decision and Order at 3. Based on the date of filing, the administrative law judge adjudicated the claim pursuant to 20 C.F.R. Part 718. The administrative law judge found that the medical evidence developed since the prior denial of benefits did not establish that claimant is totally disabled by a respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(b)(2). The administrative law judge therefore determined that claimant failed to establish a change in the applicable condition of entitlement, as required by 20 C.F.R. §725.309(d). Accordingly, the administrative law judge denied benefits.

On appeal, claimant generally challenges the denial of benefits. Employer, in a combined response brief and brief in support of its cross-appeal, urges affirmance of the denial of benefits, and, in the event that the denial is not affirmed, argues that the administrative law judge erred in determining that employer is the responsible operator. The Director, Office of Workers' Compensation Programs (the Director), responds, urging affirmance of the finding that employer is the responsible operator. The Director argues further that the administrative law judge properly found that the new evidence did not establish total disability. However, the Director requests that the denial of benefits be

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[1] Jerry Murphree, a benefits counselor with Stone Mountain Health Services of St. Charles, West Virginia, requested on behalf of claimant, that the Board review the administrative law judge's decision, but Mr. Murphree is not representing claimant on appeal. *See Shelton v. Claude V. Keen Trucking Co.*, 19 BLR 1-88 (1985)(Order).

[2] Claimant's first claim for benefits, filed on August 16, 1991, was denied on December 2, 1991 because claimant failed to establish the existence of pneumoconiosis or that he was totally disabled by a respiratory or pulmonary impairment. Director's Exhibit 1. Claimant filed a second claim on April 3, 2000, which was denied on March 29, 2004, because although claimant established the existence of pneumoconiosis, he did not establish that he was totally disabled. *Id.* Claimant filed his current claim for benefits on November 11, 2005. Director's Exhibit 3.

[3] The record indicates that claimant's coal mine employment was in Tennessee. Director's Exhibits 4, 6. Accordingly, this case arises within the jurisdiction 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*).

vacated and the case remanded for him to provide claimant with a complete pulmonary evaluation. Employer has filed a reply brief, reiterating its contention that it is not the responsible operator. Employer argues further that the Director waived the complete pulmonary evaluation issue by failing to raise it below, and alternatively contends that claimant received a complete pulmonary evaluation.

In an appeal filed by a claimant without the assistance of counsel, the Board considers the issue raised to be whether the Decision and Order below is supported by substantial evidence. *McFall v. Jewell Ridge Coal Co.*, 12 BLR 1-176, 1-177 (1989). 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).

To be entitled to benefits under the Act, claimant must demonstrate by a preponderance of the evidence that he is totally disabled due to pneumoconiosis arising out of coal mine employment. 30 U.S.C. §901; 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). The prior denial was based on claimant's failure to establish total disability. Director's Exhibit 1. Consequently, claimant had to submit new evidence establishing total disability to obtain review of the merits of his claim. 20 C.F.R. §725.309(d)(2),(3).

One method of establishing total disability is by means of the irrebuttable presumption set forth at 20 C.F.R. §718.304. 20 C.F.R. §718.204(b)(1). Section 411(c)(3) of the Act, implemented by Section 718.304 of the regulations, 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 introduction of legally sufficient evidence of complicated pneumoconiosis does not automatically qualify a claimant for invocation of 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, 389-90, 21 BLR 2-615, 2-628-29 (6th Cir. 1999); *Melnick v. Consolidation Coal Co.*, 16 BLR 1-31, 1-33 (1991)(*en banc*). In this case, the record contains new x-ray readings and a new medical report relevant to a determination of complicated pneumoconiosis under 20 C.F.R. §718.304(a),(c).

Pursuant to 20 C.F.R. §718.304(a), the administrative law judge considered eight readings of two new x-rays and considered the readers' radiological qualifications. All of the readings were rendered by physicians qualified as both Board-certified radiologists and B readers. Drs. Ahmed and Miller read the January 12, 2006 x-ray as positive for "Category A" large opacities. Director's Exhibit 9; Claimant's Exhibit 2. Drs. Scott and Wheeler read the same x-ray as "0," or negative, for large opacities. Director's Exhibit 11; Employer's Exhibit 1. Dr. Wheeler commented that fibrosis and masses compatible with conglomerate granulomatous disease, histoplasmosis, or tuberculosis were present on the January 12, 2006 x-ray. Employer's Exhibit 1. Drs. Ahmed and Alexander read the June 14, 2006 x-ray as positive for "Category A" and "Category B" large opacities, respectively, Director's Exhibit 10; Claimant's Exhibit 1, while Drs. Scott and Wheeler read the same x-ray as negative for any large opacities. Director's Exhibit 11, Employer's Exhibit 2. Dr. Wheeler commented that the nodular infiltrates present on the June 14, 2006 x-ray were typical of granulomatous disease, not pneumoconiosis. Employer's Exhibit 2.

Based on "the equivalent qualifications of the physicians," the administrative law judge found that neither x-ray established the existence of complicated pneumoconiosis. Decision and Order at 8. Considering the readings of both x-rays together, the administrative law judge determined that claimant did not meet his burden of proof to establish complicated pneumoconiosis. We conclude that substantial evidence supports the administrative law judge's permissible finding that the preponderance of the x-ray evidence did not establish complicated pneumoconiosis. *See Director, OWCP v. Greenwich Collieries* [*Ondecko*], 512 U.S. 267, 18 BLR 2A-1 (1994); *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. We therefore affirm the administrative law judge's finding pursuant to pursuant to 20 C.F.R. §718.304(a).

Pursuant to 20 C.F.R. §718.304(c), the administrative law judge considered the new medical report of Dr. Burrell, who examined claimant on behalf of the Department of Labor on January 12, 2006. Director's Exhibit 9. Based on Dr. Ahmed's positive reading of the January 12, 2006 x-ray, Dr. Burrell diagnosed "Pneumoconiosis Simple and Complicated based on X-Ray findings." Director's Exhibit 9 at 4. The administrative law judge reasonably discounted Dr. Burrell's diagnosis on the ground that

it was based on a reading of an x-ray that the administrative law judge found did not establish complicated pneumoconiosis. *See Gray*, 176 F.3d at 389-90, 21 BLR at 2-628-29. We therefore affirm the administrative law judge's finding pursuant to 20 C.F.R. §718.304(c), as well as his determination that claimant did not qualify for the irrebuttable presumption of total disability due to pneumoconiosis pursuant to 20 C.F.R. §718.304.

Claimant may also attempt to establish total disability by means of medical evidence meeting the standards of 20 C.F.R. §718.204(b)(2)(i)-(iv). 20 C.F.R. §718.204(b)(2). Pursuant to 20 C.F.R. §718.204(b)(2)(i), the administrative law judge considered two new pulmonary function studies administered on October 21, 2005 and January 12, 2006. He accurately found that these pulmonary function studies produced non-qualifying values.[4] Director's Exhibits 9, 11. Likewise, pursuant to 20 C.F.R. §718.204(b)(2)(ii), the administrative law judge correctly found that the new blood gas study, administered on January 12, 2006, produced non-qualifying values. Director's Exhibit 9; Decision and Order at 10. Further, the administrative law judge accurately noted that the record contains no new evidence of cor pulmonale with right-sided congestive heart failure. *See* 20 C.F.R. §718.204(b)(2)(iii). We therefore affirm the administrative law judge's finding that total disability was not established pursuant to 20 C.F.R. §718.204(b)(2)(i)-(iii).

Pursuant to 20 C.F.R. §718.204(b)(2)(iv), the administrative law judge considered Dr. Burrell's new medical report. Dr. Burrell reported that claimant's pulmonary function and blood gas studies were "normal." Director's Exhibit 9 at 3. In the "Cardiopulmonary Diagnoses" section of his report, Dr. Burrell diagnosed claimant with "COPD with emphysema - by history" and "Pneumoconiosis Simple and Complicated based on X-Ray findings." *Id*. at 4. Dr. Burrell opined that claimant "is totally disabled for coal mine employment due to his cardiopulmonary conditions." *Id*. The administrative law judge permissibly found that Dr. Burrell's opinion was not well-reasoned, since, apart from diagnosing complicated pneumoconiosis based on an x-ray, Dr. Burrell did not adequately explain his conclusion that claimant is totally disabled. *See Director, OWCP v. Rowe*, 710 F.2d 251, 255, 5 BLR 2-99, 2-103 (6th Cir. 1983); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989)(*en banc*); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987). Because substantial evidence supports the administrative law judge's credibility determination, we affirm the administrative law judge's finding that total disability was not established pursuant to 20 C.F.R. §718.204(b)(2)(iv).

[4] A "qualifying" objective study yields values equal to or less than those listed in the tables at 20 C.F.R. Part 718, Appendices B, C for establishing total disability. A "non-qualifying" study exceeds those values. *See* 20 C.F.R. §718.204(b)(2)(i),(ii).

Based on the foregoing, we affirm administrative law judge's finding that the new evidence did not establish total disability pursuant to 20 C.F.R. §718.204(b)(1),(2). Therefore, we affirm the administrative law judge's finding that claimant failed to establish a change in the applicable condition of entitlement, and we affirm the denial of benefits pursuant to 20 C.F.R. §725.309(d). Thus, we need not address employer's cross-appeal, challenging its designation as the responsible operator.

Lastly, the Director contends that because the administrative law judge "reject[ed] Dr. Burrell's opinion," the record is "devoid of any opinion from the Director on the determinative issue of total disability," and that, as a result, he did not satisfy his obligation to provide claimant with a complete pulmonary evaluation.[5] Director's Brief at 7.

The Act requires that "[e]ach miner who files a claim . . . be provided an opportunity to substantiate his or her claim by means of a complete pulmonary evaluation." 30 U.S.C. §923(b), as implemented by 20 C.F.R. §§718.101(a), 725.406; *see Hodges v. BethEnergy Mines, Inc.*, 18 BLR 1-84, 1-88 n.3 (1984). Subsequent to the filing of the Director's brief requesting that we remand this case for another pulmonary evaluation, the United States Court of Appeals for the Sixth Circuit set forth the standard for determining whether a pulmonary evaluation is complete:

> In the end, the DOL's duty to supply a complete pulmonary evaluation does not amount to a duty to meet the claimant's burden of proof for him. In some cases, that evaluation will do the trick. In other cases, it will not. But the test of "complete[ness]" is not whether the evaluation presents a winning case. The DOL meets its statutory obligation to provide a "complete pulmonary evaluation" under 30 U.S.C. § 923(b) when it pays for an examining physician who (1) performs all the medical tests required by 20 C.F.R. §§718.101(a) and 725.406(a), and (2) specifically links each conclusion in his or her medical opinion to those medical tests. Together, the completion of these tasks will result in a medical opinion . . . that is both documented, i.e., based on objective medical evidence, and reasoned.

Greene v. King James Coal Mining, Inc., 575 F.3d 628, 641-42, --- BLR --- (6th Cir. 2009). In *Greene*, the court held that while the physician who performed the DOL-sponsored pulmonary evaluation "could have explained his reasoning more carefully," the miner received a complete pulmonary evaluation, given that the physician's report

[5] We reject employer's contention that the Director waived the complete pulmonary evaluation issue by failing to argue it below. *See Hodges v. BethEnergy Mines, Inc.*, 18 BLR 1-84, 1-89-90 (1994).

addressed all of the elements of entitlement, "even if lacking in persuasive detail." *Greene*, 575 F.3d at 641, --- BLR at ---.

The record reflects that Dr. Burrell conducted an examination and the full range of testing required by the regulations, and addressed each element of entitlement on the Department of Labor examination form. 20 C.F.R. §§718.101(a), 718.104, 725.406(a); Director's Exhibit 9. The administrative law judge discounted Dr. Burrell's diagnosis of complicated pneumoconiosis because it was based on an x-ray reading that the administrative law judge found did not establish complicated pneumoconiosis, and he further found that Dr. Burrell did not otherwise explain his diagnosis of total disability. The administrative law judge's determination to discount Dr. Burrell's opinion because it was not fully supported or explained does not establish a violation of the Director's statutory duty. *See Greene*, 575 F.3d at 641, --- BLR at ---; *R.G.B.* [*Blackburn*] *v. Southern Ohio Coal Co.*, --- BLR ---, BRB No. 08-0491 BLA, slip op. at 19 (2009)(*en banc*). Consequently, we conclude that, under the standard enunciated in *Greene*, the Director fulfilled his statutory obligation to provide claimant with a complete pulmonary evaluation, and that therefore, we need not remand this case to the district director.

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

SO ORDERED.

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NANCY S. DOLDER, Chief
Administrative Appeals Judge

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ROY P. SMITH
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge