BRB No. 09-0344 BLA

HERSHEL HYLTON	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
FLAT TOP COLLIERY CORPORATION	)	
	)	
and	)	
	)	
WEST VIRGINIA CWP FUND	)	DATE ISSUED: 12/16/2009
	)	
Employer/Carrier-Respondents	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order – Denial of Benefits of Richard T. Stansell-Gamm, Administrative Law Judge, United States Department of Labor.

John Cline, Piney View, West Virginia, for claimant.

William P. Margelis (Jackson Kelly PLLC), Morgantown, West Virginia, for employer/carrier.

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

PER CURIAM:

Claimant appeals the Decision and Order – Denial of Benefits (06-BLA-5855) of Administrative Law Judge Richard T. Stansell-Gamm (the administrative law judge),

rendered on a subsequent claim[1] 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). The administrative law judge credited claimant with more than ten years of coal mine employment,[2] based on claimant's testimony, and adjudicated this claim pursuant to the regulations contained in 20 C.F.R. Part 718. The administrative law judge determined that the medical evidence developed since the prior denial of benefits did not establish that claimant is totally disabled pursuant to 20 C.F.R. §718.204(b)(1), (2). The administrative law judge therefore determined that claimant did not 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 asserts that the administrative law judge erred in his consideration of the new x-ray evidence when he found that claimant did not qualify for the irrebuttable presumption of total disability due to pneumoconiosis pursuant to 20 C.F.R. §§718.204(b)(1), 718.304(a). Employer responds in support of the administrative law judge's denial of benefits. The Director, Office of Workers' Compensation Programs has declined to file a response in this appeal.[3]

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[1] Claimant filed a claim for benefits on December 4, 1985, which was denied by the district director on April 22, 1986, for failure to establish total disability. Director's Exhibit 2. Claimant filed another claim for benefits on February 26, 2003. Director's Exhibit 3. On April 14, 2004, the district director denied the claim for failure to establish total disability. On May 12, 2004, the district director received claimant's request that his claim "be re-evaluated." On May 14, 2004, a claims examiner asked claimant, in writing, whether he was requesting reconsideration by the district director or a hearing before an administrative law judge. The record does not reflect that claimant responded or took any further action until filing the present claim on June 24, 2005. The administrative law judge found that the district director's April 14, 2004 decision denying the 2003 claim became final, and claimant does not challenge that determination on appeal.

[2] The law of the United States Court of Appeals for the Fourth Circuit is applicable as claimant was employed in the coal mining industry in West Virginia. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*).

[3] We affirm, as unchallenged on appeal, the administrative law judge's findings that claimant's 2003 claim was finally denied, and that the new evidence does not establish the existence of a totally disabling respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(b)(2). *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

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). Claimant's prior claim was denied because he did not establish that he was totally disabled. Director's Exhibit 3. Consequently, claimant had to submit new evidence establishing total disability in order to obtain review of the merits of his 2005 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). Under Section 411(c)(3) of the Act, 30 U.S.C. §923(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 (A) an x-ray of the miner's lungs shows an opacity greater than one centimeter that would be classified as Category A, B, or C; (B) a biopsy or autopsy shows massive lesions in the lung; or (C) when diagnosed by other means, the condition could reasonably be expected to reveal a result equivalent to (A) or (B). *See* 30 U.S.C. §921(c)(3)(A); 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 20 C.F.R. §718.304. The administrative law judge must consider all relevant evidence on this issue, *i.e.*, evidence that supports a finding of complicated pneumoconiosis, as well as evidence that does not support a finding of complicated pneumoconiosis, resolve the conflicts, and make a finding of fact. *See 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 (1991)(*en banc*).

Claimant's sole argument on appeal is that the administrative law judge erred in his consideration of the September 19, 2005 x-ray evidence as to the existence of complicated pneumoconiosis under 20 C.F.R. §718.304(a). Specifically, claimant asserts that the administrative law judge arbitrarily dismissed Dr. Rasmussen's positive interpretation of this x-ray as entitled to no probative value. Claimant's Brief at 5. We

reject claimant's allegation of error. Claimant mischaracterizes the administrative law judge's findings.

Pursuant to 20 C.F.R. §718.304(a), the administrative law judge considered nine interpretations of three new x-rays, dated September 19, 2005, December 7, 2005, and July 27, 2006,[4] and he considered the readers' radiological qualifications. In light of the conflicting readings by equally qualified physicians, the administrative law judge found each x-ray to be inconclusive and therefore, he found the x-ray evidence, as a whole, to be inconclusive for the existence of large opacities. With regard to the September 19, 2005 x-ray, the administrative law judge specifically found:

> Since dual qualified radiologists are better situated to interpret chest x-rays for pneumoconiosis, the assessments by Dr. Abramowitz, Dr. Alexander, Dr. Scott and Dr. Scatarige are more probative than Dr. Rasmussen's reading. In turn, the professional dispute between the four better qualified radiologists renders the September 19, 2005 chest x-ray inconclusive for a large pulmonary opacity consistent with pneumoconiosis.

Decision and Order at 9 (footnote omitted). In so finding, the administrative law judge cited case law holding that an administrative law judge may accord greater weight to the interpretations by physicians who are dually-qualified as Board-certified radiologists and B readers. Decision and Order at 9 n.14, *citing Zeigler Coal Co. v. Director, OWCP* [*Hawker*], 326 F.3d 894 (7th Cir. 2003), *Cranor v. Peabody Coal Co.*, 22 BLR 1-1 (1999)(*en banc*).

Thus, contrary to claimant's assertion, the administrative law judge did not ignore Dr. Rasmussen's x-ray interpretation; he considered Dr. Rasmussen's interpretation and permissibly found that the interpretations by the physicians with superior radiological qualifications were entitled to greater weight. *See Cranor*, 22 BLR at 1-7. Because the

[4] The September 19, 2005 x-ray was interpreted by Dr. Rasmussen, a B reader, and by Drs. Abramowitz and Alexander, dually-qualified Board-certified radiologists and B readers, as positive for "Category A" large opacities of complicated pneumoconiosis. Director's Exhibits 12, 13; Claimant's Exhibits 1, 7. Drs. Scott and Scatarige, dually-qualified readers, interpreted the same x-ray as "0," or negative, for any large opacities. Employer's Exhibits 6-8. Dr. Rasmussen interpreted the December 7, 2005 x-ray as positive for "Category A" large opacities, while Dr. Zaldivar, a B reader, read the same x-ray as negative for large opacities. Director's Exhibit 14; Claimant's Exhibit 6. Dr. Rasmussen interpreted the July 27, 2006 x-ray as positive for "Category A" large opacities, and Dr. Hippensteel, a B reader, read the same x-ray as negative for large opacities. Claimant's Exhibit 6; Employer's Exhibit 3.

interpretations by dually-qualified physicians conflicted as to the existence of large opacities, the administrative law judge reasonably determined that the September 19, 2005 x-ray was inconclusive on this issue. *See Adkins v. Director, OWCP*, 958 F.2d 49, 52-53, 16 BLR 2-61, 2-66 (4th Cir. 1992). As claimant raises no further challenge to the administrative law judge's weighing of the x-ray evidence, we affirm the administrative law judge's finding that the preponderance of the new x-ray evidence did not establish the existence of large opacities pursuant to 20 C.F.R. §718.304(a).

Therefore, we affirm the administrative law judge's finding that claimant did not establish that he suffers from complicated pneumoconiosis based on the new evidence pursuant to 20 C.F.R. §718.304 and thus, is not entitled to the irrebuttable presumption of total disability due to pneumoconiosis. *See* 20 C.F.R. §718.204(b)(1). Consequently, we affirm the administrative law judge's finding that claimant did not 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). *See White*, 23 BLR at 1-3.

Accordingly, the administrative law judge's Decision and Order – Denial of Benefits is affirmed.

SO ORDERED.

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NANCY S. DOLDER, Chief
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge

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JUDITH S. BOGGS
Administrative Appeals Judge