BRB No. 09-0399 BLA

OPIE HANSHEW	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
KING POWELLTON MINING, INCORPORATED	)	
	)	
and	)	
	)	DATE ISSUED: 02/26/2010
WEST VIRGINIA COAL WORKERS' PNEUMOCONIOSIS 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 Daniel L. Leland, Administrative Law Judge, United States Department of Labor.

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

Mark J. Grigoraci (Robinson & McElwee PLLC), Charleston, West Virginia, for employer.

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

PER CURIAM:

Employer appeals the Decision and Order - Awarding Benefits (2008-BLA-5602) of Administrative Law Judge Daniel L. Leland, 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).[1] In a Decision and Order dated January 26, 2009, the administrative law judge credited the miner with twenty-five years of coal mine employment and adjudicated this claim pursuant to the regulations contained in 20 C.F.R. Part 718. The administrative law judge accepted employer's concession that the miner had simple pneumoconiosis arising out of his coal mine employment pursuant to 20 C.F.R. §§718.202(a), 718.203. The administrative law judge further found that the newly submitted x-ray evidence was sufficient to establish complicated pneumoconiosis pursuant to 20 C.F.R. §718.304(a), and that this finding was also supported by the newly submitted CT scan evidence pursuant 20 C.F.R. §718.304(c). Thus, the administrative law judge found that claimant demonstrated a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309. The administrative law judge further found, based on his review of the entire record, that claimant established complicated pneumoconiosis and was entitled to the irrebuttable presumption of total disability due to pneumoconiosis at 20 C.F.R. §718.304. Accordingly, the administrative law judge awarded benefits.

On appeal, employer contends that the administrative law judge erred in finding the x-ray and CT scan evidence to be sufficient to establish the existence of complicated pneumoconiosis. Employer also alleges that the administrative law judge erred in determining the date for commencement of benefits. Claimant responds, urging affirmance of the award of benefits. The Director, Office of Workers' Compensation Programs, has not filed a response brief.[2] Employer has also filed a reply brief,

[1] Claimant first filed a claim on May 4, 1999, which was denied by the district director on July 19, 1999 because claimant did not establish any of the elements of entitlement. Director's Exhibit 1. Claimant filed a second claim on March 23, 2004. Director's Exhibit 2. The district director found that while claimant established the existence of pneumoconiosis, the evidence was insufficient to establish total disability and denied benefits on October 18, 2004. *Id*. Claimant took no action with regard to the denial of his claim until he filed the current subsequent claim on July 23, 2007. Director's Exhibit 4.

[2] We affirm, as unchallenged by the parties on appeal, the administrative law judge's finding of twenty-five years of coal mine employment. *See Coen v. Director, OWCP*, 7 BLR 1-30, 1-33 (1984); *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

reiterating its arguments that the evidence does not support invocation of the irrebuttable presumption of total disability due to pneumoconiosis and that the administrative law judge erred in determining the date of onset of complicated pneumoconiosis.

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.[3] 33 U.S.C. §921(b)(3), as incorporated into the Act by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman and 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, that he is totally disabled and that his disability is due to pneumoconiosis. *See* 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure to establish any one of these elements precludes a finding of 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.*, 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, because claimant's prior claim was denied for failure to establish total disability, he had to submit new evidence to prove that he is totally disabled in order to satisfy the requirements of 20 C.F.R. §725.309. *See White*, 23 BLR at 1-3.

Section 411(c)(3) of the Act, 30 U.S.C. §921(c)(3), as implemented by 20 C.F.R. §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, yields massive lesions in the lung; or (c) when diagnosed by other means, is a condition which would yield results equivalent to (a) or (b). 30 U.S.C. §921(c)(3); 20 C.F.R. §718.304.

[3] 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 1.

The introduction of legally sufficient evidence of complicated pneumoconiosis does not, however, automatically invoke the irrebuttable presumption found at 20 C.F.R. §718.304. The administrative law judge must examine all the evidence on this issue, i.e., evidence of simple and complicated pneumoconiosis, as well as evidence of no pneumoconiosis, resolve any conflicts, and make a finding of fact. *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*); *Truitt v. North American Coal Corp.*, 2 BLR 1-199 (1979).

The administrative law judge considered five readings of four newly submitted x-rays dated November 1, 2007, April 23, 2008, April 25, 2008 and May 22, 2008 pursuant to 20 C.F.R. §718.304(a). The administrative law judge found that Dr. Rasmussen, a B reader, read the November 1, 2007 film as positive for simple and complicated pneumoconiosis, Category A, while Dr. Wheeler, a Board-certified radiologist and B reader, read the same film as positive for simple pneumoconiosis, 1/0, q/q, but did not find complicated pneumoconiosis. Decision and Order at 6; Director's Exhibit 15; Employer's Exhibit 1. The administrative law judge found that "based on Dr. Wheeler's superior qualifications," the November 1, 2007 x-ray was negative for complicated pneumoconiosis. Decision and Order at 6. The administrative law judge found that the April 23, 2008 x-ray was read by Dr. Zaldivar, a B-reader, as showing only small opacities for simple pneumoconiosis. *Id*; Employer's Exhibit 2. The administrative law judge further found that Dr. DePonte, a B reader and Board-certified radiologist, read the two most recent x-rays of April 25, 2008 and May 22, 2008, as positive for simple pneumoconiosis, 2/2, q/q, and complicated pneumoconiosis, Category A. Decision and Order at 6; Claimant's Exhibits 1, 2.

The administrative law judge found that although the x-ray readings by the dually qualified radiologists would appear to be in equipoise, he gave controlling weight to Dr. DePonte's positive readings for complicated pneumoconiosis, "as Dr. DePonte read two x-rays and Dr. Wheeler read only one x-ray." Decision and Order at 6. The administrative law judge also noted that "the x-rays interpreted by Dr. DePonte were six months and seven months more recent than the x-ray interpreted by Dr. Wheeler, and because pneumoconiosis is a progressive and irreversible disease, it may be appropriate to accord greater weight to the most recent evidence of record." Decision and Order at 6. Thus, the administrative law judge found that claimant satisfied his burden to establish that he has complicated pneumoconiosis based on the x-ray evidence pursuant to 20 C.F.R. §718.304(a).

The administrative law judge also found, pursuant to 20 C.F.R. §718.304(c), that the one CT scan of record[4] supported a finding that claimant had complicated pneumoconiosis. The administrative law judge stated:

> While Dr. Ramas did not explain exactly what she meant by developing conglomerate masses, in my view her use of this term supports the findings of Dr. DePonte that the opacities in the miner's lungs were of the larger variety and exceeded one centimeter in diameter. I find that invocation of the [20 C.F.R.] §718.304 presumption is supported by the CT scan at (c).

Decision and Order at 6. Then, after considering all of the evidence from the miner's prior claim and the current claim, the administrative law judge concluded that claimant was entitled to the irrebuttable presumption of total disability due to pneumoconiosis, and awarded benefits. *Id.*

Employer contends that the administrative law judge erred in finding that claimant established the existence of complicated pneumoconiosis based on the x-ray evidence. Specifically, employer contends that the administrative law judge erred in finding that Dr. DePonte had a more complete picture of the x-ray evidence. Memorandum in Support of Petition for Review at 7-8. Employer notes that Dr. DePonte "only read one more x-ray than the other physicians, only read x-rays that she took, and the x-rays were only separated by one month." *Id*. at 7-8. Contrary to employer's argument, the administrative law judge properly performed both a qualitative and quantitative review of the x-ray readings by the most qualified radiologists, and permissibly credited Dr. DePonte's positive readings for complicated pneumoconiosis because Dr. DePonte had the opportunity to read two x-rays, while Dr. Wheeler only read one x-ray. *See Adkins v. Director, OWCP*, 958 F.2d 49, 16 BLR 2-61 (4th Cir. 1992); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-152 (1989) *(en banc*).

We also reject employer's assertion that the administrative law judge erred in applying the "later evidence rule" because such an analysis ignores the relatively short period of time – six or seven months – between the x-rays, and fails to take into account Dr. Zaldivar's x-ray reading. Memorandum in Support of Petition for Review at 8, *citing* Decision and Order at 6. Contrary to employer's contention, the administrative law judge acknowledged that the April 23, 2008 x-ray was read as negative for complicated

[4] A CT scan of the chest was taken on June 22, 2008. Director's Exhibit 3. The scan was read by Dr. Ramas as showing a nodular pattern in the lungs and conglomerate masses developing in the suprahilar regions, consistent with coal workers' pneumoconiosis. *Id*.

pneumoconiosis by Dr. Zaldivar. However, the administrative law judge also rationally focused his analysis on the conflicting readings by Drs. DePonte and Wheeler, as they were the only dually qualified radiologists. *Dempsey v. Sewell Coal Corp*., 23 BLR 1-47, 1-65 (2004) *(en banc*); *Cranor v. Peabody Coal Co.*, 22 BLR 1-1, 1-7 (1999) (*en banc on recon*.) In resolving the conflict between Drs. DePonte and Wheeler, the administrative law judge permissibly considered the chronology of the x-rays and assigned controlling weight to Dr. DePonte's positive readings because they were of the two most recent x-rays. *See Lane Hollow Coal Co. v. Director, OWCP [Lockhart]*, 137 F.3d 799, 21 BLR 2-302 (4th Cir. 1998); *Adkins*, 958 F.2d 49, 52, 16 BLR 2-61, 2-66 (4th Cir. 1992); *Woodward v. Director, OWCP*, 991 F.2d 314, 17 BLR 2-77 (6th Cir. 1993).

The administrative law judge has broad discretion to resolve the conflicts in the medical evidence and the Board is not empowered to reweigh the evidence nor substitute its inferences for those of the administrative law judge. *See Piney Mountain Coal Co. v. Mays*, 176 F.3d 753, 21 BLR 2-587 (4th Cir. 1999); *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1989); *Worley v. Blue Diamond Coal Co.*, 12 BLR 1-20 (1988). Because substantial evidence supports the administrative law judge's finding that claimant established the existence of complicated pneumoconiosis pursuant to 20 C.F.R. §718.304(a), that finding is affirmed. Furthermore, as there is no contrary evidence for consideration pursuant to 20 C.F.R. §718.304(b) or (c), we affirm the administrative law judge's overall finding that claimant has complicated pneumoconiosis and is entitled to the irrebuttable presumption of total disability due to pneumoconiosis.[5] *Lester*, 993 F.2d at 1145-46, 17 BLR at 2-117-18; *Melnick*, 16 BLR at 1-33-34. We therefore affirm the award of benefits in this claim.

[5] Employer asserts that the administrative law judge erred in finding the CT scan reading by Dr. Ramas to be supportive of a finding of complicated pneumoconiosis at 20 C.F.R. §718.304(c). Memorandum in Support of Petition for Review at 9-10. Employer specifically contends that claimant did not satisfy his burden to show that a CT scan is a medically acceptable test for diagnosing the presence or absence of complicated pneumoconiosis pursuant to 20 C.F.R. §718.107. *Id*. at 9. Employer also asserts that the administrative law judge substituted his opinion for that of Dr. Ramas when the administrative law judge found that Dr. Ramas's CT scan reading of conglomerate masses was the equivalent of a finding of large opacities exceeding one centimeter on x-ray. *Id*. However, even if claimant is unable to establish the existence of complicated pneumoconiosis based on the CT scan reading of Dr. Ramas at 20 C.F.R. §718.304(c), there is no contrary evidence to dispute the administrative law judge's finding of complicated pneumoconiosis based on the x-ray evidence at 20 C.F.R. §718.304(a). Thus, employer has not demonstrated error by the administrative law judge pursuant to 20 C.F.R. §718.304(c) that would require the Board to vacate the award and remand the case for further consideration. *See Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984).

Finally, we address employer's assertion that the administrative law judge erred in determining the date for commencement of benefits. Once entitlement to benefits is demonstrated, the date for the commencement of those benefits is determined by the month in which the miner became totally disabled due to pneumoconiosis. 20 C.F.R. §725.503; *see Lykins v. Director*, OWCP, 12 BLR 1-181, 1-182-83 (1989). When benefits are awarded based on the application of the irrebuttable presumption, total disability is established by proof of complicated pneumoconiosis. *Williams v. Director, OWCP*, 13 BLR 1-28, 1-30 (1989). In such cases, in determining whether the evidence establishes an onset date of total disability, the fact-finder shoulder consider whether the evidence of record establishes an onset date of the miner's complicated pneumoconiosis. *Id*. When the evidence does not establish the date that simple pneumoconiosis became complicated pneumoconiosis, the onset date for payment of benefits is the month in which the claim was filed unless the administrative law judge credits evidence that claimant did not have complicated pneumoconiosis for any period subsequent to the date of filing, in which case benefits must commence following such period. *See* 20 C.F.R. §725.503(b).

In this case, the administrative law judge found that claimant was "entitled to benefits as of November 1, 2007, the date of the x-ray that Dr. Rasmussen interpreted as showing large opacities." Decision and Order at 7. Employer challenges this finding because the administrative law judge specifically determined that the November 1, 2007 x-ray was not sufficient to establish complicated pneumoconiosis, stating that: "[b]ased on Dr. Wheeler's superior qualifications . . . the November 1, 2007 x-ray does not indicate large opacities." Decision and Order at 6. We agree with employer that the administrative law judge's onset determination is irrational, and that his order should be modified for benefits to commence as of April 2008, the month of the first credited diagnosis of complicated pneumoconiosis. Because the administrative law judge credited readings of x-rays dated November 1, 2007 and April 23, 2008, showing only simple pneumoconiosis, the administrative law judge erred in relying on the discredited complicated pneumoconiosis reading of the November 1, 2007 x-ray to select that date for commencement of benefits. Consequently, we modify the administrative law judge's decision to reflect that the miner is entitled to benefits as of April 2008. *Williams*, 13 BLR at 1-30.

Accordingly, the administrative law judge's Decision and Order - Awarding Benefits is affirmed, but modified as to the date from which benefits commence, consistent with this opinion.

SO ORDERED.

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ROY P. SMITH
Administrative Appeals Judge

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REGINA C. McGRANERY
Administrative Appeals Judge

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JUDITH S. BOGGS
Administrative Appeals Judge