BRB No. 13-0565 BLA

ROBERT L. WYATT	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
RANGER FUEL CORPORATION	)	DATE ISSUED: 07/30/2014
	)	
Employer-Petitioner	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order on Remand – Awarding Benefits of Richard A. Morgan, Administrative Law Judge, United States Department of Labor.

Joseph E. Wolfe and Ryan C. Gilligan (Wolfe Williams Rutherford & Reynolds), Norton, Virginia, for claimant.

George E. Roeder, III and Kathy L. Snyder (Jackson Kelly PLLC), Morgantown, West Virginia, for employer.

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

PER CURIAM:

Employer appeals the Decision and Order on Remand (2003-BLA-6253) of Administrative Law Judge Richard A. Morgan awarding benefits on a subsequent claim filed on August 21, 2001,[1] pursuant to the provisions of the Black Lung Benefits Act, as

[1] Claimant filed his first claim on April 5, 1988. Director's Exhibit 1. It was finally denied by a claims examiner on September 15, 1988, because the evidence was insufficient to establish that claimant was totally disabled by pneumoconiosis. *Id*. Claimant filed his second claim on July 3, 1990. *Id*. On May 18, 1993, Administrative

amended, 30 U.S.C. §§901-944 (2012) (the Act). This case is before the Board for the fourth time.[2]

Pursuant to the last appeal filed by employer, the Board vacated the award of benefits issued by Administrative Law Judge Michael P. Lesniak, holding that he did not properly consider the evidence relevant to the existence of complicated pneumoconiosis pursuant to 20 C.F.R. §718.304. The Board also vacated Judge Lesniak's finding that the new evidence established a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309. Rejecting employer's request that the case be reassigned to another administrative law judge on remand, the Board remanded the case to Judge Lesniak with instructions to evaluate first the evidence in each of the relevant categories, and then to weigh to all of the relevant evidence together, prior to rendering a finding with regard to invocation of the irrebuttable presumption at 20 C.F.R. §718.304. *Wyatt v. Ranger Fuel Corp*, BRB No. 09-0375 BLA (Jan. 27, 2010) (unpub.).

On remand, the case was reassigned to Judge Morgan (the administrative law judge) because Judge Lesniak was no longer with the Office of Administrative Law Judges. In accordance with the Board's instructions, the administrative law judge reconsidered the evidence and found that the new x-ray evidence was sufficient to establish complicated pneumoconiosis at 20 C.F.R. §718.304(a), but that the CT scan and medical opinion evidence did not establish complicated pneumoconiosis at 20 C.F.R. §718.304(c).[3] The administrative law judge further found that, when weighed together, the evidence of record was sufficient to establish the existence of complicated pneumoconiosis, thereby establishing invocation of the irrebuttable presumption of total disability due to pneumoconiosis at 20 C.F.R. §718.304. Consequently, the administrative law judge found that the new evidence established a change in an

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Law Judge Edward Terhune Miller issued a Decision and Order denying benefits because the evidence did not establish that claimant was totally disabled from a respiratory or pulmonary impairment or that he was totally disabled due to pneumoconiosis. *Id*. Claimant took no further action until he filed the present subsequent claim on August 21, 2001. Director's Exhibit 3.

[2] The full procedural history of this case is set forth in the Board's decisions in *Wyatt v. Ranger Fuel Corp*., BRB No. 05-0371 BLA (Jan. 30, 2006) (unpub.), *R.W.* [*Wyatt*] *v. Ranger Fuel Corp*., BRB No. 07-0276 BLA (Dec. 21, 2007) (unpub.), and *Wyatt v. Ranger Fuel Corp*., BRB No. 09-0375 BLA (Jan. 27, 2010) (unpub.).

[3] The record does not contain any biopsy evidence relevant to 20 C.F.R. §718.304(b).

applicable condition of entitlement at 20 C.F.R. §725.309. Accordingly, the administrative law judge awarded benefits.

On appeal, employer challenges the administrative law judge's finding that claimant established the existence of complicated pneumoconiosis, pursuant to 20 C.F.R. §718.304, and is entitled to the irrebuttable presumption of total disability due to pneumoconiosis at 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 supported by substantial evidence, is rational, and is in accordance with applicable law.[4] 33 U.S.C. §921(b)(3), as incorporated into the Act 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 filed pursuant to 20 C.F.R. Part 718, claimant must establish 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. Failure to establish any one of these elements precludes entitlement. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1989).

When 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 the evidence was insufficient to establish that claimant was totally disabled from a respiratory or pulmonary impairment at 20 C.F.R. §718.204(b)(2) or that he was totally disabled due to pneumoconiosis at 20 C.F.R. §718.204(c). Consequently, in order to establish a change in an applicable condition of entitlement, claimant had to submit new evidence establishing one of these elements. 20 C.F.R. §725.309(d)(2), (3); *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

[4] The record indicates that claimant's last coal mine employment was in West Virginia. Director's Exhibits 1, 4. Accordingly, the Board will apply the law of the United States Court of Appeals for the Fourth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989) (en banc).

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 which 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 the irrebuttable presumption found at 20 C.F.R. §718.304. In determining whether claimant has established invocation of the irrebuttable presumption of total disability due to pneumoconiosis at 20 C.F.R. §718.304, the administrative law judge must weigh together all of the evidence relevant to the presence or absence of complicated pneumoconiosis. *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). Additionally, the United States Court of Appeals for the Fourth Circuit has held that "[b]ecause prong (A) sets out an entirely objective scientific standard" for diagnosing complicated pneumoconiosis, that is, an x-ray opacity greater than one centimeter in diameter, the administrative law judge must determine whether a condition which is diagnosed by biopsy or autopsy under prong (B) or by other means under prong (C) would show as a greater-than-one-centimeter opacity if it were seen on a chest x-ray. *Eastern Associated Coal Corp. v. Director, OWCP* [*Scarbro*], 220 F.3d 250, 255, 22 BLR 2-93, 2-100 (4th Cir. 2000); *Double B Mining, Inc. v. Blankenship*, 177 F.3d 240, 243, 22 BLR 2-554, 2-561 (4th Cir. 1999).

Pursuant to 20 C.F.R. §718.304(a), the administrative law judge considered nine interpretations of five x-rays dated October 29, 2001, March 13, 2002, August 31, 2002, November 5, 2002, and February 13, 2003. Decision and Order on Remand at 5-7. Dr. Patel, a B reader and a Board-certified radiologist, read the October 29, 2001 x-ray as 2/2 for small opacities and Category A for large opacities, while Dr. Wheeler, a B reader and a Board-certified radiologist, read the same x-ray as 0/1 for small opacities and Category 0 for large opacities.[5] Director's Exhibit 18; Employer's Exhibit 7. Dr. Zaldivar, a B reader, read the March 13, 2002 x-ray as 3/2 for small opacities and Category 0 for large opacities. Director's Exhibit 13. Dr. DePonte, a B reader and a Board-certified radiologist, read the August 31, 2002 x-ray as 2/3 for small opacities and Category A for large opacities, while Dr. Wheeler read the same x-ray as 0/1 for small opacities and Category 0 for large opacities. Director's Exhibit 21; Claimant's Exhibit 2; Employer's Exhibit 7. Dr. Willis, a B reader and a Board-certified radiologist, read the November 5, 2002 x-ray as 2/2 for small opacities and Category B for large opacities, while Dr. Wiot, a B reader and a Board-certified radiologist, read the same x-ray as 2/2 for small opacities

[5] Dr. Binns, a B reader and a Board-certified radiologist, read the October 29, 2001 x-ray for quality only, classifying its readability as quality 2. Director's Exhibit 19.

and Category 0 for large opacities. Director's Exhibit 14; Claimant's Exhibit 4. Dr. Alexander, a B reader and a Board-certified radiologist, read the February 13, 2003 x-ray as 3/2 for small opacities and Category A for large opacities, while Dr. Wheeler read the same x-ray as 0/1 for small opacities and Category 0 for large opacities. Director's Exhibit 18; Employer's Exhibit 7.

Prior to weighing the conflicting x-ray evidence at 20 C.F.R. §718.304(a), the administrative law judge stated:

> In his closing brief, Claimant argues that the negative x-ray interpretations of Dr. Wheeler should be discredited because Dr. Wheeler failed to diagnose simple pneumoconiosis radiographically; therefore, his interpretation of the x-rays as negative for complicated pneumoconiosis is of limited probative value.

Decision and Order on Remand at 4. The administrative law judge, after noting that the Board had previously affirmed Judge Lesniak's finding of simple pneumoconiosis, cited several unpublished Board decisions wherein the Board had "accepted this line of reasoning." Decision and Order on Remand at 4. Adopting this rationale, the administrative law judge gave "diminished weight" to Dr. Wheeler's readings of the x-rays dated October 29, 2001, August 31, 2002 and February 13, 2004.

Weighing each of the x-rays individually, the administrative law judge found that the October 29, 2001 x-ray was positive for complicated pneumoconiosis, based on Dr. Patel's reading, and that the March 13, 2002 x-ray was negative for complicated pneumoconiosis, based on Dr. Zaldivar's uncontradicted reading. Decision and Order on Remand at 5. The administrative law judge determined that the August 31, 2002 x-ray was positive for complicated pneumoconiosis, based on Dr. DePonte's reading. *Id*. at 6. The administrative law judge concluded that the November 5, 2002 x-ray was negative for the presence of complicated pneumoconiosis after giving greater weight to Dr. Wiot's reading, based on Dr. Wiot's superior radiological qualifications.[6] *Id*. The administrative law judge found that the February 13, 2003 x-ray was positive for complicated pneumoconiosis, based on Dr. Alexander's reading. *Id*. at 6.

[6] The administrative law judge noted that: Drs. Wiot and Willis were both dually-qualified as B readers and Board-certified radiologists; Dr. Wiot was a professor emeritus of Radiology at the University of Cincinnati, where he was a professor for thirty-three years; he was also published in his field and involved in establishing the ILO standards for pneumoconiosis. *See* Decision and Order on Remand at 6; Director's Exhibit 14.

Weighing all of the new x-rays showing either simple and/or complicated pneumoconiosis together, the administrative law judge determined that the three positive readings, by Drs. Patel, DePonte and Alexander, outweighed the two negative readings, by Drs. Wiot and Zaldivar. Decision and Order on Remand at 7. In addition, the administrative law judge noted that Dr. Zaldivar's negative reading was entitled to less weight because he is the only physician who is not dually-qualified. *Id*. The administrative law judge thus concluded that the x-ray interpretations overall were positive for complicated pneumoconiosis and found that claimant established the existence of complicated pneumoconiosis pursuant to 20 C.F.R. §718.304(a). *Id*.

Employer contends that the administrative law judge erred in according limited weight to the x-ray readings of Dr. Wheeler, arguing that the administrative law judge improperly discredited Dr. Wheeler's finding of no complicated pneumoconiosis because the doctor failed to recognize simple pneumoconiosis on claimant's x-rays. This argument is without merit. The administrative law judge permissibly assigned less weight to Dr. Wheeler's readings, that claimant does not have complicated pneumoconiosis, because the doctor read the x-rays as not showing simple pneumoconiosis, contrary to the administrative law judge own finding, *see* Decision and Order on Remand at 4 n.8, and contrary to all of the other physicians, who found at least simple pneumoconiosis. *See Toler v. E. Associated Coal Co.*, 43 F.3d 109, 19 BLR 2-70 (4th Cir. 1995); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(en banc); *Trujillo v. Kaiser Steel Corp.*, 8 BLR 1-472 (1986).

Employer also argues that the administrative law judge erred in giving less weight to Dr. Zaldivar's reading of the March 13, 2002 x-ray.[7] Employer's Brief at 12. Contrary to employer's assertion, the administrative law judge properly gave less weight to Dr. Zaldivar's reading because he is not dually qualified and the other x-ray readings of record were performed by physicians who are both B readers and Board-certified radiologists. *See Worhach v. Director, OWCP*, 17 BLR 1-105 (1993); *Roberts v. Bethlehem Mines Corp.*, 8 BLR 1-211 (1985). Accordingly, we affirm the administrative law judge's finding that claimant established the existence of complicated pneumoconiosis at 20 C.F.R. §718.304(a).

Relevant to 20 C.F.R. §718.304(c), the administrative law judge considered two CT scan readings and the medical opinions of Drs. Porterfield, Crisalli, Robinette and Zaldivar. Decision and Order on Remand at 7-8. Dr. Shaw, whose qualifications are not set forth in the record, interpreted the December 13, 2000 CT scan and did not identify

[7] Employer states that "[b]y finding Dr. Zaldivar's interpretation of the March 13, 2002, x-ray to be less probative, the [administrative law judge] essentially accorded Dr. Zaldivar's interpretation no weight at all." Employer's Brief at 12.

any large opacities, but observed multiple, small, pulmonary nodules and stated that "[t]he differential diagnosis includes silicosis vs. metastatic diseases vs. [tuberculosis]. We favor silicosis, given the distribution of bilateral pleural thickening." Director's Exhibit 12. Dr. Wheeler also interpreted the December 13, 2000 CT scan. He did not find evidence of either simple or complicated pneumoconiosis, and testified that CT scans provide more detail and are more sensitive than x-rays. Employer's Exhibits 1, 7. The administrative law judge found that the CT scan evidence was negative for complicated pneumoconiosis, noting that Dr. Shaw's reference to silicosis was equivocal, at best. Decision and Order on Remand at 8.

With respect to the medical opinion evidence, the administrative law judge gave limited weight to the opinions of Drs. Porterfield, Crisalli and Robinette, as they were "predicated solely on x-ray evidence." Decision and Order on Remand at 8. The administrative law judge further found that, as Dr. Zaldivar did not diagnose complicated pneumoconiosis, claimant also failed to establish its existence by medical opinion evidence, or by a preponderance of the evidence at 20 C.F.R. §718.304(c). *Id*.; *see* Director's Exhibit 15; Claimant's Exhibit 1; Employer's Exhibits 10, 12. The administrative law judge determined, therefore, that the medical opinion evidence was insufficient to establish the presence of complicated pneumoconiosis at 20 C.F.R. §718.304(c). Decision and Order on Remand at 8. The administrative law judge then weighed all of the relevant evidence together and concluded that claimant satisfied his burden of proving the existence of complicated pneumoconiosis by a preponderance of the evidence. Decision and Order on Remand at 9.

Employer alleges that the administrative law judge improperly treated his finding that claimant established the existence of complicated pneumoconiosis, based on the x-ray evidence, as creating a presumption that employer was required to rebut. Employer also maintains that the administrative law judge should have determined that the negative CT scan and medical opinion evidence outweighed the x-ray evidence of complicated pneumoconiosis. Employer's contentions are without merit.

The administrative law judge acted within his discretion, as fact-finder, in according greater weight to the x-ray evidence, which was obtained between October 2001 and February 2003, over the CT scan evidence, which was obtained in December 2000, on the grounds that x-ray evidence is more recent and shows that claimant's pneumoconiosis has progressed and worsened. Decision and Order on Remand at 9; *see Adkins v. Director, OWCP*, 958 F.2d 49, 16 BLR 2-61 (4th Cir. 1992); *Clark*, 12 BLR at 1-154; *Casella v. Kaiser Steel Corp.*, 9 BLR 1-131 (1986). Additionally, the administrative law judge rationally determined that Dr. Zaldivar's medical opinion, ruling out complicated pneumoconiosis, was entitled to little weight, "as his determination . . . was predicated, at least in part, on the CT scan readings." Decision and Order at 9; *see Milburn Colliery Co. v. Hicks*, 138 F.3d 536, 21 BLR 2-341 (4th Cir. 1998); *Sterling*

Smokeless Coal Co. v. Akers, 131 F.3d 440-41, 21 BLR 2-275-76 (4th Cir. 1997). The administrative law judge also properly weighed all of the record evidence together as to the presence or absence of complicated pneumoconiosis and explained the basis for his credibility determinations. *See Lester*, 993 F.2d at 1145-46, 17 BLR at 2-117-18; *Wojtowicz v. Duquesne Light Co*., 12 BLR 1-162 (1989). Consequently, we affirm, as supported by substantial evidence, the administrative law judge's finding that claimant satisfied his burden to establish that he was complicated pneumoconiosis pursuant to 20 C.F.R. §718.304, and that he is entitled to invoke the irrebuttable presumption of total disability due to pneumoconiosis.[8] 30 U.S.C. §921(c)(3); *see Scarbro*, 220 F.3d at 255, 22 BLR at 2-100; *Lester*, 993 F.2d at 1145-46, 17 BLR at 2-117-18; *Braenovich v. Cannelton Industries, Inc./Cypress Amax*, 22 BLR 1-236, 1-245 (2003) (Gabauer, J., concurring); *Melnick*, 16 BLR at 1-33-34; We further 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. *See White*, 23 BLR at 1-3.

[8] The administrative law judge's finding that claimant's complicated pneumoconiosis arose out of coal mine employment pursuant to 20 C.F.R. §718.203(b) is affirmed, as unchallenged on appeal. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

Accordingly, the administrative law judge's Decision and Order on Remand – Awarding Benefits is affirmed.

SO ORDERED.

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BETTY JEAN HALL, Acting Chief
Administrative Appeals Judge

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ROY P. SMITH
Administrative Appeals Judge

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REGINA C. McGRANERY
Administrative Appeals Judge