BRB No. 01-0849 BLA

GEORGE MESSER	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
DOMINION COAL CORPORATION	)	DATE ISSUED:
	)	
Employer-Respondent	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order of Mollie W. Neal, Administrative Law Judge, United States Department of Labor.

Lawrence L. Moise, III, Emporia, Virginia, for claimant.

Ronald E. Gilbertson (Bell, Boyd & Lloyd PLLC), Washington, D.C., for employer.

Mary Forrest-Doyle (Eugene Scalia, Solicitor of Labor; Donald S. Shire, Associate Solicitor; Rae Ellen Frank James, Deputy 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: SMITH, McGRANERY and HALL, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order (00-BLA-0801) of Administrative Law Judge Mollie W. Neal denying benefits on a duplicate 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] The administrative law judge credited claimant with thirty years of coal mine employment and adjudicated this duplicate claim[2] pursuant to the regulations contained in 20 C.F.R. Part 718.[3] The administrative law judge found the newly submitted evidence insufficient to establish invocation of the irrebuttable presumption of total disability due to pneumoconiosis pursuant to 20 C.F.R. §718.304. The administrative law judge also found the newly submitted evidence insufficient to establish total disability due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c). Consequently, the administrative law judge concluded that claimant failed to establish a material change in conditions pursuant to 20 C.F.R. §725.309 (2000).[4] Accordingly, the administrative law

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[1]Citing *Tennessee Consolidated Coal Co. v. Kirk*, 264 F.3d 602, BLR (6th Cir. 2001), employer contends that claimant's 1999 duplicate claim is untimely. This case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit which has not addressed the issue. Since the caselaw of the Sixth Circuit has no precedential value for the instant case and, in any event, the language recited in *Kirk* is *dicta*, the Board will apply its decision holding that the statute of limitations contained in Section 422(f) of the Act, as implemented by 20 C.F.R. §725.308, applies to the first claim filed, and does not apply to subsequent claims. *See Andryka v. Rochester & Pittsburgh Coal Co.*, 14 BLR 1-34 (1990); *Faulk v. Peabody Coal Co.*, 14 BLR 1-18 (1990). Hence, we reject employer's contention that claimant's 1999 duplicate claim is untimely. *See Andryka, supra*; *Faulk, supra*.

[2]Claimant's initial claim was filed on March 2, 1982. Director's Exhibit 27. On January 30, 1987, Administrative Law Judge Aaron Silverman issued a Decision and Order denying benefits, *id*., which the Board affirmed, *Messer v. Dominion Coal Corp.*, BRB No. 87-0418 BLA (Aug. 31, 1988)(unpub.). Judge Silverman's denial was based upon claimant's failure to establish total disability due to pneumoconiosis. Director's Exhibit 27. Claimant filed his first request for modification on May 2, 1989. *Id*. On February 10, 1992, Administrative Law Judge Clement J. Kichuk issued a Decision and Order denying benefits. *Id*. Claimant filed his second request for modification on December 22, 1992. *Id*. On June 26, 1995, Administrative Law Judge Nicodemo De Gregorio issued a Decision and Order denying benefits based upon claimant's failure to establish complicated pneumoconiosis and total disability due to pneumoconiosis. *Id*. Because claimant did not pursue this claim any further, the denial became final. Claimant's most recent claim was filed on August 25, 1999. Director's Exhibit 1.

[3]The Department of Labor has amended the regulations implementing the Federal Coal Mine Health and Safety Act of 1969, as amended. These regulations became effective on January 19, 2001, and are found at 20 C.F.R. Parts 718, 722, 725 and 726 (2001). All citations to the regulations, unless otherwise noted, refer to the amended regulations.

[4]The revisions to the regulation at 20 C.F.R. §725.309 apply only to claims filed after

judge denied benefits.

On appeal, claimant challenges the administrative law judge's finding that the newly submitted evidence is insufficient to establish invocation of the irrebuttable presumption of total disability due to pneumoconiosis pursuant to 20 C.F.R. §718.304. Claimant also challenges the administrative law judge's finding that the newly submitted evidence is insufficient to establish total disability due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c). Employer responds to claimant's appeal, urging affirmance of the administrative law judge's Decision and Order. The Director, Office of Workers' Compensation Programs, has declined to address the specific issues raised in claimant's brief, but asserts that claimant's most recent claim is timely, citing 20 C.F.R. §802.212(b).

The Board's scope of review is defined by statute. If the administrative law judge's findings of fact and conclusions of law are supported by substantial evidence, are rational, and are consistent with applicable law, they are binding upon this Board and may not be disturbed. 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).

Section 725.309 (2000) provides that a duplicate claim is subject to automatic denial on the basis of the prior denial, unless there is a determination of a material change in conditions since the denial of the prior claim. The United States Court of Appeals for the Fourth Circuit, within whose jurisdiction this case arises, adopted a standard whereby an administrative law judge must consider all of the new evidence, favorable and unfavorable to claimant, and determine whether the miner has proven at least one of the elements of entitlement previously adjudicated against him, and thereby has established a material change in conditions at 20 C.F.R. §725.309(d) (2000). *See Lisa Lee Mines v. Director, OWCP* [*Rutter*], 86 F.3d 1358, 20 BLR 2-227, (4th Cir. 1996), *rev'g en banc*, 57 F.3d 402, 19 BLR 2-223 (4th Cir. 1995). In the instant case, the administrative law judge stated that "[claimant] has previously been found to have met his burden of proving the existence of pneumoconiosis arising out of coal mine employment, and total disability." Decision and Order at 16. The administrative law judge also stated, however, that "[u]nless [claimant] can show that his simple pneumoconiosis has progressed to the stage of complicated pneumoconiosis, or that his total disability is caused, in part, by simple coal workers' pneumoconiosis or a respiratory impairment arising out of his coal mine employment, his claim must be denied on the basis of the denial of his prior claim under [20 C.F.R. §725.309 (2000)]." *Id.*

January 19, 2001.

Initially, claimant contends that the administrative law judge erred in finding the newly submitted evidence insufficient to establish invocation of the irrebuttable presumption of total disability due to pneumoconiosis pursuant to 20 C.F.R. §718.304. The pertinent regulations require the administrative law judge to evaluate the evidence in each category at 20 C.F.R. §718.304(a), (b) and (c), before weighing together the categories at 20 C.F.R. §718.304(a), (b) and (c) and determining whether invocation has been established. *See Melnick v. Consolidation Coal Co.*, 16 BLR 1-31 (1991)(*en banc*). Since the administrative law judge ultimately weighed together all of the evidence in the various categories at 20 C.F.R. §718.304(a), (b) and (c), *see infra* at 6, we hold that any error by the administrative law judge in failing first to evaluate the evidence separately in each category at 20 C.F.R. §718.304(a), (b) and (c) is harmless. *See Eastern Associated Coal Corp. v. Director, OWCP [Scarbro]*, 220 F.3d 250, BLR (4th Cir. 2000); *see also Larioni v. Director, OWCP*, 6 BLR 1-710 (1983).

With regard to 20 C.F.R. §718.304(a), the administrative law judge stated that "the newly submitted evidence consists of four readings by physicians, certified as B-readers and [B]oard-certified radiologists, of the October 14, 1999 chest film, one of which suggests the progression from large opacities A and B to size C."[5] Decision and Order at 16. Dr. Robinette, a B-reader, and Drs. Alexander, Barrett and McLoud, B-readers and Board-certified radiologists, found that the October 14, 1999 x-ray demonstrated the presence of complicated pneumoconiosis.[6] Director's Exhibits 10, 12, 13, 26; Claimant's Exhibit 1. However, the administrative law judge also stated that "at least an equal number of equally qualified physicians read the same chest film as positive for simple pneumoconiosis only."[7]

[5]In view of the administrative law judge's finding that the conflicting evidence is insufficient to establish a material change in conditions at 20 C.F.R. §725.309 (2000), *see infra* at 7-8, we decline to address the issue of whether the progression of opacities from category B to C are sufficient to establish a material change in conditions.

[6]Drs. Alexander, Barrett and Robinette classified the opacities on the October 14, 1999 x-ray as category B. Director's Exhibits 10, 26; Claimant's Exhibit 1. Dr. McLoud classified the opacities on the same x-ray as category C. Director's Exhibits 12, 13.

[7]In weighing the conflicting interpretations of the October 14, 1999 x-ray, the administrative law judge relied only upon the interpretations of simple pneumoconiosis by Drs. Aycoth, Cappiello and Pathak. Decision and Order at 16; Employer's Exhibits 17-19. Drs. Scott and Wheeler also indicated that the October 14, 1999 x-ray did not demonstrate the presence of complicated pneumoconiosis. Employer's Exhibits 9, 10. However, Drs. Scott and Wheeler also read the October 14, 1999 x-ray as negative for simple pneumoconiosis. *Id*.

Decision and Order at 16. Dr. Forehand, a B-reader, and Drs. Aycoth, Cappiello, Pathak, Scott and Wheeler, B-readers and Board-certified radiologists, found that the October 14, 1999 x-ray did not demonstrate the presence of complicated pneumoconiosis. Director's Exhibit 9; Employer's Exhibits 9, 10, 17-19.

Claimant asserts that the readings of the October 14, 1999 x-ray by Drs. Scott and Wheeler are not credible because they are inconsistent with earlier readings by Drs. Scott and Wheeler. As previously noted, Drs. Aycoth, Cappiello, Pathak, Scott and Wheeler found that the October 14, 1999 x-ray did not demonstrate the presence of complicated pneumoconiosis. However, Drs. Aycoth, Cappiello and Pathak read the October 14, 1999 x-ray as positive for simple pneumoconiosis, Employer's Exhibits 17-19, while Drs. Scott and Wheeler read the same x-ray as negative for simple pneumoconiosis, Employer's Exhibits 9, 10. Drs. Scott and Wheeler read earlier x-rays as positive for simple pneumoconiosis. Director's Exhibit 27. Dr. Wheeler, at an October 2, 2000 deposition, stated that his prior opinion that pneumoconiosis was causing the small nodules in earlier x-rays had changed based upon follow-up examinations and the May 22, 2000 CT scan. Employer's Exhibit 15 (Dr. Wheeler's Deposition at 12). Dr. Wheeler stated:

> The nodular pattern that was predominating in the x-rays in the 1980s is gone. There are few linear scars left. It's a totally different lung pattern. Pneumoconiosis won't go away, but granulomatous disease can certainly go away, self-cure. They'll almost always leave some scarring when they do self-cure, or if they're properly treated, the nodules can disappear completely.

Id at 13. An administrative law judge may not discredit the x-ray readings of a radiologist on the basis that the radiologist rendered contradictory interpretations of separate x-rays. *See generally Gober v. Reading Anthracite Co.*, 12 BLR 1-67 (1988). Unlike physicians who render medical opinions with respect to the existence of complicated pneumoconiosis on the bases of physical examinations, x-ray evidence, objective evidence, smoking and coal mine employment histories, and reviews of medical evidence, radiologists render interpretations of the presence or absence of roentgenographic manifestations of the disease solely on the basis of the x-ray film that is before them. *Compare* 20 C.F.R. §§718.202(a)(1) and 718.304(a) with 20 C.F.R. §§718.202(a)(4) and 718.304(c). Thus, we reject claimant's assertion that the negative readings of the October 14, 1999 x-ray by Drs. Scott and Wheeler are not credible because Drs. Scott and Wheeler read earlier x-rays as positive for pneumoconiosis.

With regard to 20 C.F.R. §718.304(c), the administrative law judge considered the newly submitted CT scan reports and medical reports of record. The administrative law judge stated that "the physician opinions are equally equivocal regarding the presence of complicated pneumoconiosis." Decision and Order at 16. In a report dated August 17, 2000, Dr. Scott interpreted the May 22, 2000 CT scan as negative for the existence of

pneumoconiosis. Employer's Exhibit 7. Similarly, in a report dated August 16, 2000, Dr. Wheeler interpreted the May 22, 2000 CT scan as negative for the existence of pneumoconiosis. Employer's Exhibit 4. In a subsequent deposition dated October 2, 2000, Dr. Wheeler opined that claimant does not have large opacities of pneumoconiosis based upon a review of x-rays and the May 22, 2000 CT scan. Employer's Exhibit 15. Dr. Fino also opined that claimant does not suffer from complicated pneumoconiosis based upon the May 22, 2000 CT scan. Employer's Exhibit 13.

Further, Dr. Templeton opined that the abnormalities observed on the May 22, 2000 x-ray and CT scan have "an unusual appearance for what would be expected with complicated CWP." Employer's Exhibit 11. Moreover, Dr. Castle opined that claimant does not suffer from complicated pneumoconiosis in a report dated August 31, 2000 and at a deposition dated December 13, 2000. Employer's Exhibits 1, 16. In contrast, Dr. Iosif opined that claimant suffers from "simple and possibly complicated coal workers' pneumoconiosis." Director's Exhibit 25.

Lastly, at a deposition dated November 14, 1999, Dr. Robinette indicated that he did not find any evidence of tuberculosis and opined that claimant suffers from pneumoconiosis with coalescence based upon radiographic evidence and CT scans. Claimant's Exhibit 2 (Dr. Robinette's Deposition at 16, 17). The administrative law judge stated that "[a]mong the opinions of the physicians submitted since the prior denial, only Dr. Robinette's opinion is definitive for a positive diagnosis of complicated pneumoconiosis." Decision and Order at 16. However, the record indicates that Dr. Robinette did not specifically opine that claimant suffers from complicated pneumoconiosis. Rather, Dr. Robinette noted that "[Dr.] Alexander, in [the interpretation of the October 14, 1999 x-ray], thought that there was a category B mass present and [it] was compatible with complicated pneumoconiosis with circumscribed pleural plaques and pleural thickening and evidence of axillary coalescence of those nodules present." Claimant's Exhibit 2 (Dr. Robinette's Deposition at 16). Nonetheless, in view of our disposition of the case at 20 C.F.R. §718.304 as a whole, *see infra* at 6, we hold that any error by the administrative law judge in mischaracterizing Dr. Robinette's opinion is harmless, *see Larioni, supra*.

The administrative law judge stated, "[u]pon consideration of all the newly submitted physician reports and the x-ray reports, I find the evidence insufficient to show that the [c]laimant's pneumoconiosis has progressed to the stage of complicated pneumoconiosis."[8] Decision and Order at 16. Since it is supported by substantial evidence, we affirm the administrative law judge's finding that the newly submitted evidence is insufficient to

[8]The record does not contain newly submitted autopsy or biopsy evidence of complicated pneumoconiosis. 20 C.F.R. §718.304(b).

establish invocation of the irrebuttable presumption of total disability due to pneumoconiosis at 20 C.F.R. §718.304. *See Director, OWCP v. Greenwich Collieries* [*Ondecko*], 512 U.S. 267, 18 BLR 2A-1 (1994), *aff'g Greenwich Collieries v. Director, OWCP*, 990 F.2d 730, 17 BLR 2-64 (3d Cir. 1993).

Next, claimant contends that the administrative law judge erred in finding the newly submitted evidence insufficient to establish total disability due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c). The administrative law judge considered the newly submitted opinions of Drs. Fino, Castle, Iosif and Robinette. The administrative law judge stated that "[t]he four physicians who addressed the cause of the [c]laimant's disability did so in well reasoned and documented medical opinions, and each is highly qualified as a pulmonary specialist." Decision and Order at 16-17. Whereas Drs. Iosif and Robinette opined that pneumoconiosis contributes to claimant's total disability, Director's Exhibits 7, 25; Claimant's Exhibit 2, Drs. Castle and Fino opined that pneumoconiosis does not contribute to claimant's total disability, Employer's Exhibits 1, 13. The administrative law judge concluded, "upon full consideration of all the physician opinions and the objective medical data each physician relied upon in support of his opinion, I find the evidence to be equally probative on the issue of whether [claimant's] disability is due to coal dust inhalation or coal mine employment." Decision and Order at 17.

Claimant asserts that the administrative law judge should have accorded determinative weight to the opinion of Dr. Iosif based upon Dr. Iosif's status as claimant's treating physician. The administrative law judge stated that "[w]hile Dr. Iosif's report is fully credited, I do not deem the five months he served as the [c]laimant's treating physician sufficient to render his opinion more probative than the other physicians who either previously examined the [c]laimant, or who reviewed his medical records and history and rendered an [sic] their opinions relating to his pulmonary condition." Decision and Order at 17. While an administrative law judge may accord greater weight to the medical opinion of a treating physician, *see Onderko v. Director, OWCP*, 14 BLR 1-2 (1989), he is not required to do so, *see Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 21 BLR 2-269 (4th Cir. 1997); *Amax Coal Co. v. Franklin*, 957 F.2d 355, 16 BLR 2-50 (7th Cir. 1992); *cf. Tussey v. Island Creek Coal Co.*, 982 F.2d 1036, 17 BLR 2-16 (6th Cir. 1993); *see also Tedesco v. Director, OWCP*, 18 BLR 1-103 (1994); *Wetzel v. Director, OWCP*, 8 BLR 1-139 (1985); *Burns v. Director, OWCP*, 7 BLR 1-597 (1984). The Board cannot reweigh the evidence or substitute its inferences for those of the administrative law judge. *See Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1989); *Fagg v. Amax Coal Co.*, 12 BLR 1-77 (1988); *Worley v. Blue Diamond Coal Co.*, 12 BLR 1-20 (1988). Because it is supported by substantial evidence, we affirm the administrative law judge's finding that the newly submitted evidence is insufficient to establish total disability due to pneumoconiosis at 20 C.F.R. §718.204(c). *See Ondecko, supra*. Moreover, we hold that substantial evidence supports the administrative law judge's finding that the evidence is insufficient to establish a

material change in conditions at 20 C.F.R. §725.309 (2000).[9] *See Rutter, supra*.

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

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge

[9]Claimant's counsel, Lawrence L. Moise, requests leave to withdraw as counsel due to his employment as an attorney with legal aid. 20 C.F.R. §802.202. The Board grants claimant's counsel's request to withdraw as counsel in this case. 20 C.F.R. §802.219.