

BRB No. 10-0529 BLA

ANGELO H. ROBERTS)
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 Claimant-Respondent)
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 v.)
)
 PEERLESS EAGLE COAL COMPANY)
)
 and)
)
 A.T. MASSEY) DATE ISSUED: 06/28/2011
)
 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 on Remand Awarding Benefits and Order Granting Request for Reconsideration of Linda S. Chapman, Administrative Law Judge, United States Department of Labor.

Derrick W. Lefler (Gibson, Lefler & Associates), Princeton, West Virginia, for claimant.

Ashley M. Harman (Jackson Kelly PLLC), Morgantown, West Virginia, for employer/carrier.

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

PER CURIAM:

Employer/carrier (employer) appeals the Decision and Order on Remand Awarding Benefits and Order Granting Request for Reconsideration (2005-BLA-5296) of

Administrative Law Judge Linda S. Chapman rendered on a subsequent claim filed on December 18, 2003, pursuant to the provisions of the Black Lung Benefits Act, 30 U.S.C. §§901-944 (2006), *amended by* Pub. L. No. 111-148, §1556, 124 Stat. 119 (2010) (to be codified at 30 U.S.C. §§921(c)(4) and 932(l)) (the Act).¹ This case is before the Board for the third time.² In the prior Decision and Order, the Board vacated the Decision and Order on Remand of Administrative Law Judge Jeffrey Tureck awarding benefits and remanded the case for further consideration of whether the newly submitted evidence established a change in one of the applicable conditions of entitlement pursuant to 20 C.F.R. §725.309. Specifically, the Board held that Judge Tureck failed to follow the Board's remand instructions to first consider only the newly submitted evidence in this subsequent claim, instead of weighing all of the evidence, old and new, in determining whether complicated pneumoconiosis and, thus, a change in an applicable condition of entitlement, were established. The Board, therefore, remanded the case for the administrative law judge to first consider whether the new evidence established the existence of complicated pneumoconiosis, and thereby a change in an applicable condition of entitlement, and to then weigh all of the evidence of record to determine whether claimant was entitled to benefits. 20 C.F.R. §§718.304, 725.309. Additionally, in light of Judge Tureck's failure to follow the Board's remand instructions, the Board instructed the Office of Administrative Law Judges to reassign this case to a different administrative law judge on remand.

On remand, the case was reassigned to Judge Chapman (the administrative law judge). Noting the procedural history of this case and the Board's remand instructions, the administrative law judge stated that the issue in this case involved whether the newly submitted evidence established that claimant's simple pneumoconiosis had developed into complicated pneumoconiosis. The administrative law judge set forth the newly submitted medical evidence of record, discussing each of the x-ray readings and medical opinions with regard to the existence of complicated pneumoconiosis. Weighing the newly submitted evidence, the administrative law judge found that the weight of the probative medical evidence was sufficient to establish the existence of complicated pneumoconiosis pursuant to Section 718.304. The administrative law judge, therefore, found that claimant had established the threshold issue of a change in an applicable

¹ The recent amendments to the Act, which became effective on March 23, 2010, do not apply to the instant case, as the subsequent claim was filed prior to January 1, 2005.

² The lengthy procedural history in this case has been fully set forth in the two prior Board decisions and is incorporated by reference herein. *A.R. [Roberts] v. Peerless Eagle Coal Co.*, BRB No. 08-0681 BLA (June 10, 2009)(unpub.); *A.R. [Roberts] v. Peerless Eagle Coal Co.*, BRB No. 07-0267 BLA (Nov. 23, 2007) unpub.).

condition of entitlement pursuant to Section 725.309. Based on her finding that claimant's simple pneumoconiosis had developed into complicated pneumoconiosis, since the denial of the prior claim, the administrative law judge determined that claimant was entitled to the irrebuttable presumption of totally disabling pneumoconiosis at Section 718.304. The administrative law judge also found that the evidence established that claimant's complicated pneumoconiosis arose out of coal mine employment and, therefore, that claimant was entitled to benefits. Accordingly, the administrative law judge awarded benefits.

In addressing the date for the commencement of benefits, the administrative law judge initially awarded benefits as of February 2004. Thereafter, the Director, Office of Workers' Compensation Programs (the Director), timely moved for reconsideration of the date for the commencement of benefits, arguing that the evidence does not establish the specific date that claimant's complicated pneumoconiosis developed from simple pneumoconiosis. The Director contended, therefore, that the appropriate onset date for commencement of benefits was December 2003, the month in which claimant filed his current claim. By Order issued on May 25, 2010, the administrative law judge granted the Director's motion and found claimant entitled to benefits as of December 2003.

On appeal, employer challenges the administrative law judge's award of benefits, arguing that the administrative law judge erred in finding the evidence sufficient to establish complicated pneumoconiosis and, thus, invocation of the irrebuttable presumption of total disability due to pneumoconiosis. Employer contends that the administrative law judge erred by selectively weighing the newly submitted x-ray evidence regarding the existence of complicated pneumoconiosis, as well as by failing to weigh all of the relevant evidence of record, including the old evidence, when finding the evidence sufficient to establish complicated pneumoconiosis. Employer also contends that the administrative law judge erred in finding that claimant was entitled to benefits as of December 2003, the month in which he filed his current claim. Claimant responds, urging affirmance of the administrative law judge's award of benefits and her determination of December 2003 as the date for the commencement of benefits. The Director has filed a letter stating that he will not file a substantive response brief unless requested to do so.

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 by 30

³ This case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit, as the miner was employed in the coal mining industry in West Virginia. See *Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*); Director's Exhibit 7.

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. Failure to establish any one of these elements precludes entitlement. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-112 (1989).

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). 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, claimant’s prior claim was denied because he failed to establish total disability. Director’s Exhibits 1-3. Consequently, in order to establish entitlement, claimant had to submit new evidence establishing that element of entitlement in order to obtain review of the case on the merits.⁴ 20 C.F.R. §725.309(d)(2), (3); see *Lisa Lee Mines v. Director, OWCP [Rutter]*, 86 F.3d 1358, 20 BLR 2-227 (4th Cir. 1996).

Complicated Pneumoconiosis

Under Section 411(c)(3) of the Act, 30 U.S.C. §921(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 the miner is suffering from a chronic dust disease of the lung which (A) when diagnosed by x-ray, yields an opacity greater than one centimeter in diameter that would be 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, would be a condition that could reasonably be expected to reveal a result equivalent to (A) or (B). See 20 C.F.R. §718.304; *Eastern Associated Coal Corp. v. Director, OWCP [Scarbro]*, 220 F.3d 250, 255, 22 BLR 2-93, 2-100 (4th

⁴ As noted in the Board’s prior decision, claimant conceded at the hearing that the evidence did not establish a totally disabling respiratory impairment pursuant to 20 C.F.R. §718.204(b). However, claimant contends that this element of entitlement is, nonetheless, established because the evidence established complicated pneumoconiosis, thereby entitling him to the irrebuttable presumption of totally disabling pneumoconiosis at 20 C.F.R. §718.304. *A.R. [Roberts] v. Peerless Eagle Coal Co.*, BRB No. 08-0681 BLA, slip op. at 4 n.5 (June 10, 2009) (unpub.); Hearing Transcript at 6.

Cir. 2000); *Double B Mining, Inc. v. Blankenship*, 177 F.3d 240, 243, 22 BLR 2-554, 2-561-62 (4th Cir. 1999); *Melnick v. Consolidation Coal Co.*, 16 BLR 1-31, 1-33-34 (1991)(*en banc*). In determining whether claimant has established invocation of the irrebuttable presumption of total disability due to pneumoconiosis pursuant to Section 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 2-1143, 1145-46 (4th Cir. 1993); *Gollie v. Elkay Mining Corp.*, 22 BLR 1-306, 1-311 (2003); *Melnick*, 16 BLR at 1-33-34.

Employer contends that the administrative law judge erred in finding that the readings by Drs. Wheeler, Scott, Spitz and Zaldivar were equivocal and speculative. Employer also contends that the administrative law judge failed to consider all of the x-ray evidence as she did not consider Dr. Binns's x-ray reading in its entirety. Additionally, employer contends that the administrative law judge erred in failing to weigh all of the evidence together, like and unlike, in determining the existence of complicated pneumoconiosis pursuant to Section 718.304. We disagree.

Based on the facts of this case, the administrative law judge's findings and the arguments raised on appeal, we hold that the administrative law judge reasonably considered the relevant evidence in finding that the newly submitted evidence is sufficient to establish complicated pneumoconiosis pursuant to Section 718.304. Contrary to employer's contention, the administrative law judge considered all aspects of the new x-ray evidence of record, setting forth each of the individual readings and the opinions relevant to the issue of complicated pneumoconiosis, as well as discussing the August 25, 2003 CT scan.⁵ Decision and Order on Remand at 6-7.

In discussing the x-ray evidence, the administrative law judge correctly found that there was no dispute among the physicians reviewing the new x-ray evidence that there was a large opacity measuring greater than one centimeter in claimant's right upper lung, and that the only dispute was whether that opacity was due to coal dust exposure. *Id.* at 7. The administrative law judge found that the diagnoses provided by Drs. Wheeler, Scott, Spitz and Zaldivar, namely that the large opacities were not complicated pneumoconiosis, but were most likely tuberculosis of unknown activity, or calcified

⁵ Contrary to employer's contention, the administrative law judge was not required to consider the additional comments on Dr. Binns's ILO classification form because, as the administrative law judge correctly noted, his reading was obtained by the district director for determining the quality of the x-ray film obtained in conjunction with the Department of Labor complete pulmonary evaluation, and not to determine the presence or absence of pneumoconiosis. Decision and Order on Remand at 3; Director's Exhibit 21.

granulomata, were insufficient to outweigh the positive readings of complicated pneumoconiosis. Decision and Order on Remand at 9. Specifically, the administrative law judge concluded that the reliability of Dr. Zaldivar's opinion: that claimant's x-ray was negative for simple and complicated pneumoconiosis; that tuberculosis was the "number one" cause to be ruled out in regard to the large mass seen on claimant's x-rays; and that the mass could presumably be complicated pneumoconiosis, if simple pneumoconiosis were present, was greatly diminished because it was based on an incomplete picture of claimant's health. Decision and Order on Remand at 8; Employer's Exhibit 4. Particularly, the administrative law judge found that Dr. Zaldivar had not been provided with the x-ray readings and the CT scan, which showed, at a minimum, the presence of simple pneumoconiosis, and x-ray readings, which definitively diagnosed the existence of complicated pneumoconiosis. The administrative law judge determined that such data, in light of Dr. Zaldivar's statement that evidence of simple pneumoconiosis would give him pause in formulating his opinion on the existence of complicated pneumoconiosis, diminished the probative value of his opinion that claimant did not have complicated pneumoconiosis. Decision and Order on Remand at 9; Employer's Exhibit 4.

Based on her conclusions regarding Dr. Zaldivar's opinion, in combination with the x-ray readings of record, the administrative law judge reasonably found that the x-ray readings of Drs. Wheeler, Scott and Spitz, suggesting that the large opacity seen was due to tuberculosis or other granulomatous disease, were speculative and equivocal, as these diagnoses were not based on evidence that claimant suffered from these diseases. *See Westmoreland Coal Co. v. Cox*, 602 F.3d 276, 285, 24 BLR 2-269, 2-284 (4th Cir. 2010); *Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 21 BLR 2-323 (4th Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 21 BLR 2-269 (4th Cir. 1997). The administrative law judge, therefore, found that the positive readings by Drs. Patel, Aycoth and Cappiello, showing the existence of both simple and complicated pneumoconiosis, were the most probative evidence of record and outweighed the contrary readings by Drs. Wheeler, Scott, Spitz and Zaldivar. *Id.* Moreover, the administrative law judge found that the positive readings were bolstered by the other medical evidence of record, namely, the July 28, 2004 opinion of Dr. Bellotte, and the August 23, 2003 CT scan, finding simple pneumoconiosis, and no other disease processes. Decision and Order on Remand at 9; Director's Exhibits 22, 34.

The administrative law judge's finding of complicated pneumoconiosis was, therefore, supported by a complete, integrated consideration of all of the available medical evidence, an approach that is legally proper under *Scarbro*. *See Scarbro*, 220 F.3d at 256, 22 BLR at 2-101 (explaining that "all of the evidence must be considered and evaluated to determine whether the evidence as a whole indicates a condition of such severity that it would produce opacities greater than one centimeter in diameter on an x-ray"); *see also Cox*, 602 F.3d at 285, 24 BLR at 2-284. Because it was based upon

substantial evidence, we affirm the administrative law judge's finding that all of the relevant evidence, when considered together, established the existence of complicated pneumoconiosis pursuant to 20 C.F.R. §718.304.

Moreover, we reject employer's contention that the administrative law judge was required to set forth a detailed analysis of the evidence submitted in conjunction with claimant's prior claims, when determining that claimant established entitlement to benefits. However, the administrative law judge is required to take into account pre-denial evidence before making a final determination.⁶ *Cox*, 602 F.3d at 288, 24 BLR at 2-287-88. As noted in her decision, the prior claim was denied based on a finding that, although simple pneumoconiosis was present, claimant was not totally disabled. The administrative law judge specifically referenced evidence in the prior claim showing that claimant had a mass in the upper lobe of his right lung that was not cancerous and she observed that the evidence in the current claim showed that the mass had grown large enough to be categorized as a category A opacity. Decision and Order on Remand at 9. Because the administrative law judge reasonably found that the new evidence established the existence of complicated pneumoconiosis, based on its progression from the simple pneumoconiosis previously established, we conclude that the administrative law judge fulfilled her obligation to consider all of the relevant evidence, including the pre-denial evidence. See *Cox*, 602 F.3d at 288, 24 BLR at 2-287-88; *Scarbro*, 220 F.3d at 256, 22 BLR at 2-101. Further, because it is unchallenged on appeal, we affirm the administrative law judge's finding that employer did not rebut the presumption that claimant's complicated pneumoconiosis arose out of his coal mine employment pursuant to 20 C.F.R. §718.203(b). *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983); Decision and Order on Remand at 10 n.3.

Consequently, we affirm the administrative law judge's findings that complicated pneumoconiosis was established and that claimant's complicated pneumoconiosis arose

⁶ In its brief, employer argues that the administrative law judge erred in failing to "consider whether all of the evidence in the record, including the evidence predating the denial of the prior claim, supports a finding of entitlement to benefits" as required by the Fourth Circuit's instruction in *Lisa Lee Mines v. Director, OWCP [Rutter]*, 57 F.3d 402, 19 BLR 2-223, *on rehearing en banc*, 86 F.3d 1358, 20 BLR 2-227 (4th Cir. 1996), *cert. denied*, *Lisa Lee Mines v. Director, Office of Workers' Compensation Programs*, 519 U.S. 1090 (1997). Employer's Brief at 12-13. The Fourth Circuit rejected an identical argument advanced by another employer in *Westmoreland Coal Co. v. Cox*, 602 F.3d 276, 24 BLR 2-269 (4th Cir. 2010), pointing out that the quoted language had been omitted from the *en banc* opinion, which had explicitly declined to endorse a similar requirement proposed by the United States Court of Appeals for the Sixth Circuit. *Cox*, 602 F.3d at 288, 24 BLR at 2-287-88.

out of coal mine employment. The administrative law judge's finding that claimant is entitled to the irrebuttable presumption of totally disabling pneumoconiosis, 30 U.S.C. §921(c)(3), is, therefore, affirmed.

Date for the Commencement of Benefits

Employer contends that the administrative law judge erred in finding that the date for the commencement of benefits was December 2003, the month in which claimant filed his claim. Instead, employer contends that March 2004 is the proper date for the commencement of benefits, as that is the month in which complicated pneumoconiosis was first diagnosed. In addition, employer contends that the administrative law judge erred in finding that the month in which claimant filed his claim to be the date for the commencement of benefits, as the application of that date violates Section 7(c) of the Administrative Procedure Act, 5 U.S.C. §556(d), as incorporated into the Act by 30 U.S.C. §932(a), by means of 33 U.S.C. §919(d) and 5 U.S.C. §554(c)(2). Employer contends that application of the filing date violates the APA "as it allows claimant to receive benefits from the date of filing[,] even when there is no medical proof submitted by the claimant showing he has a disabling respiratory impairment caused by pneumoconiosis at that time." Employer's Brief at 15-16. We disagree.

In a case where a miner is found entitled to the irrebuttable presumption of total disability due to pneumoconiosis at Section 718.304, the fact-finder must consider whether the evidence of record establishes the onset date of claimant's complicated pneumoconiosis. In this case, that would be the date that the miner's simple pneumoconiosis progressed into complicated pneumoconiosis. *See Williams v. Director, OWCP*, 13 BLR 1-28 (1989). If the evidence does not reflect that date, the date for the commencement of benefits is the month in which the claim was filed, unless the evidence affirmatively establishes that claimant had only simple pneumoconiosis for any period subsequent to the date of filing. In that case, the date for the commencement of benefits follows the period of simple pneumoconiosis. 20 C.F.R. §725.503(b); *Williams*, 13 BLR at 1-30.

In this case, the administrative law judge reviewed the record and found that the first definitive evidence of complicated pneumoconiosis was the March 2, 2004 x-ray reading by Dr. Patel. Order Granting Request for Reconsideration at 2. The administrative law judge additionally found that the evidence between December 2003 and March 2004 was inconclusive, as to the existence of complicated pneumoconiosis, and, as such, was insufficient to establish that claimant was not totally disabled due to pneumoconiosis prior to March 2004. *Id.* In light of this finding, we affirm the administrative law judge's determination that the date for the commencement of benefits was December 2003, the month in which claimant filed his current claim for benefits. 20

C.F.R. §725.503; *Williams*, 13 BLR at 1-30. Moreover, we reject employer's argument that relying on the date of filing violates Section 7(c) of the Administrative Procedure Act. See generally *Amax Coal Co. v. Director, OWCP [Chubb]*, 312 F.3d 882, 893, 22 BLR 2-514, 2-532-34 (7th Cir. 2002)(rejecting identical argument); *Nat'l Mining Ass'n v. Chao*, 160 F.Supp.2d 47, 70-71 (D.D.C. 2001).

Accordingly, the administrative law judge's Decision and Order on Remand Awarding Benefits and Order Granting Request for Reconsideration are affirmed.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge