BRB No. 08-0143 BLA

J.M., Jr. Claimant-Petitioner	)	
v.	)	
HOLLY BETH COAL COMPANY, INCORPORATED	)	
and	)	
ROCKWOOD INSURANCE COMPANY	)	DATE ISSUED: 10/30/2008
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 on Remand - Denial of Benefits of Richard T. Stansell-Gamm, Administrative Law Judge, United States Department of Labor.

J.M., Jr., Bristol, Virginia, *pro se*.

Anne Musgrove Rife (Penn, Stuart & Eskridge), Abingdon, Virginia, for employer.

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

PER CURIAM:

Claimant appeals, without the assistance of legal counsel,[1] the Decision and Order on Remand - Denial of Benefits (04-BLA-5277) of Administrative Law Judge Richard T. Stansell-Gamm 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). This case has a lengthy procedural history.[2] In the last appeal, the Board reviewed the administrative law judge's award of benefits based on his determination that claimant demonstrated a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309(d), because the evidence submitted subsequent to the previous denial established the existence of complicated pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(3), entitling claimant to the irrebuttable presumption of total disability due to pneumoconiosis. Section 411(c)(3) of the Act, 30 U.S.C. §921(c)(3), as implemented by 20 C.F.R. §718.304; Decision and Order at 29-31. The Board affirmed the administrative law judge's determination of twenty-eight and three-quarters years of qualifying coal mine employment, and his finding that claimant's pneumoconiosis arose out of coal mine employment, but held that the administrative law judge erred in finding the existence of complicated pneumoconiosis established pursuant to Section 718.304, because several of the newly submitted x-ray interpretations upon which he relied failed to diagnose the presence of a "large opacity" as defined in Section 718.304. *See* [*J.M., Jr.*] *v. Holly Beth Coal Co.*, BRB No. 05-0818 BLA (May 25, 2006)(unpub.), slip op. at 3, n.2; *see* 20 C.F.R. §718.304(a); *Tackett v. Director, OWCP*, 7 BLR 1-703 (1985); *Arnold v. Consolidation Coal Co.*, 7 BLR 1-648 (1985). Accordingly, the Board vacated the administrative law judge's award of benefits and remanded the case for further consideration of the relevant

[1] Jerry Murphree, a benefits counselor with Stone Mountain Health Services of St. Charles, Virginia, requested, on behalf of claimant, that the Board review the administrative law judge's decision, but Mr. Murphree is not representing claimant on appeal. *See Shelton v. Claude V. Keen Trucking Co.*, 19 BLR 1-88 (1995)(Order).

[2] The procedural history of claimant's prior claim, filed on February 9, 1987, is sets forth in [*J.M., Jr.*] *v. Holly Beth Coal Co.*, BRB No. 98-1524 BLA (May 17, 2000) (unpub.). Subsequent to that decision, Administrative Law Judge Richard A. Morgan found that the x-ray evidence failed to support a finding of complicated pneumoconiosis and denied benefits on September 26, 2000. Claimant's request for modification of that denial was denied by the district director on March 28, 2001. On April 22, 2002, claimant filed the instant subsequent claim. Director's Exhibit 3. Following a hearing, Administrative Law Judge Richard T. Stansell-Gamm issued a Decision and Order awarding benefits, on June 7, 2005. Following the Board's remand of the case to the administrative law judge, [*J.M., Jr.*] *v. Holly Beth Coal Co.*, BRB No. 05-0818 BLA (May 25, 2006)(unpub.), the administrative law judge issued the Decision and Order on Remand - Denial of Benefits from which claimant now appeals.

evidence consistent with the decisions in *Director, OWCP v. Eastern Associated Coal Corp.* [*Scarbro*], 220 F.3d 250, 22 BLR 2-93 (4th Cir. 2000); *Double B Mining, Inc. v. Blankenship*, 177 F.3d 240, 243, 22 BLR 2-554, 2-561 (4th Cir. 1999); *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). The administrative law judge was further directed to weigh all of the remaining newly submitted evidence to ascertain whether claimant has established a change in an applicable condition of entitlement, and if so, to adjudicate the merits of entitlement based on all the evidence of record. 20 C.F.R. §§718.304(a)-(c); 718.203, 718.204; *see also Scarbro*, 220 F.3d 250, 22 BLR 2-93; *Lester v. Director, OWCP*, 993 F.2d 1143, 17 BLR 2-114 (4th Cir. 1993); *Melnick v. Consolidation Coal Co.*, 16 BLR 1-31 (1991).

On remand, the administrative law judge found that claimant had failed to establish a change in an applicable condition of entitlement, as he was unable to establish either the existence of complicated pneumoconiosis pursuant to Section 718.304 or the existence of a totally disabling respiratory or pulmonary impairment pursuant to Section 718.204(b), and thus failed to establish a change in an applicable condition of entitlement pursuant to Section 725.309(d). Accordingly, benefits were denied. In the present appeal, claimant generally challenges the administrative law judge's denial of benefits. Employer responds, urging affirmance of the denial of benefits. The Director, Office of Workers' Compensation Programs, has not submitted a brief in this appeal.

In an appeal filed by a claimant without the assistance of counsel, the Board will consider the issue raised to be whether the Decision and Order below is supported by substantial evidence. *Hodges v. BethEnergy Mines, Inc.*, 18 BLR 1-84 (1994); *McFall v. Jewell Ridge Coal Co.*, 12 BLR 1-176, 1-177 (1989); *Stark v. Director, OWCP*, 9 BLR 1-36 (1986). We must affirm the administrative law judge's Decision and Order if the findings of fact and conclusions of law are supported by substantial evidence, are rational, and are consistent 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. Failure to establish any one of these elements precludes entitlement. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-112 (1989); *Trent v. Director, OWCP*, 11 BLR 1-26, 1-27 (1987).

Where a miner files a claim for benefits more than one year after the 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); *see also Consolidation Coal Co. v. Williams*, 453 F.3d 609, 23 BLR 2-345 (4th Cir. 2006). The applicable conditions of entitlement "shall be limited to those conditions upon which the prior claim was based." 20 C.F.R. §725.309(d)(2). Claimant's prior claim was denied because he failed to establish total disability; consequently, claimant had to submit new evidence establishing this element of entitlement to obtain review of the merits of his claim. 20 C.F.R. §725.309(d)(2), (3).

Based on our review, the administrative law judge's determination that claimant has failed to establish a change in an applicable element of entitlement, and that entitlement is therefore precluded on this claim, is supported by substantial evidence and contains no error requiring remand or reversal. In so concluding, we first address the administrative law judge's finding that the newly submitted evidence failed to establish the existence of complicated pneumoconiosis at Section 718.304. Section 411(c)(3) of the Act, as implemented by Section 718.304, 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 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. To determine whether claimant has established invocation of the irrebuttable presumption pursuant to Section 718.304, the administrative law judge is required to weigh together all of the evidence relevant to the presence or absence of complicated pneumoconiosis. *See Gollie v. Elkay Mining Corp*., 22 BLR 1-306, 1-311 (2003); *Lester v. Director, OWCP*, 993 F.2d at 1145-46, 17 BLR at 2-117-118; *Melnick*, 16 BLR at 1-33-34. The mere introduction of legally sufficient evidence of complicated pneumoconiosis does not automatically qualify a claimant for the irrebuttable presumption found at Section 718.304. *Melnick*, 16 BLR at 1-33; *Truitt v. North Am. Coal Corp.*, 2 BLR 1-199 (1979), *aff'd sub nom. Director, OWCP v. North Am. Coal Corp.*, 626 F.2d 1137, 2 BLR 2-45 (3d Cir. 1980).

Re-evaluating the six newly submitted x-rays for the presence of complicated pneumoconiosis, the administrative law judge permissibly determined that those of December 11, 2001, June 2, 2004, and October 22, 2003 were negative for the presence of a large pulmonary opacity consistent with complicated pneumoconiosis.[3] Because the

[3] The interpretations of the December 11, 2001 x-ray are contained in Director's Exhibit 38; interpretations of the June 4, 2004 x-ray are contained in Claimant's Exhibit 4, Employer's Exhibit 10; and interpretations of the October 22, 2003 x-ray are contained in Claimant's Exhibits 1, 2, Employer's Exhibits 2, 6.

first two x-rays' readings, those of December 11, 2001 and June 2, 2004, reported no large opacities,[4] both were found to be negative for the presence of complicated pneumoconiosis. Decision and Order at 9.

The October 22, 2003 x-ray was read by B readers Drs. Pathak and Robinette, respectively, as showing a Category B large opacity, and a "pneumoconiosis-related large opacity."[5] Claimant's Exhibit 2; Decision and Order at 9. However, neither Dr. Renn, a B reader, nor Dr. Scatarige, a dually qualified radiologist, identified any large pulmonary opacities consistent with pneumoconiosis. The administrative law judge accorded greater weight to the reading by Dr. Scatarige based on his superior credentials, and determined that the x-ray was negative for the existence of a large pulmonary opacity consistent with pneumoconiosis.

The administrative law judge found the three remaining x-rays of September 12, 2002, May 12, 2004, and June 28, 2002 to be inconclusive, based on conflicting readings by similarly qualified physicians.[6] Specifically, Dr. Wheeler, a dually qualified reader, found no evidence of a large pulmonary opacity in the September 12, 2002 x-ray, while Dr. Alexander, also a dually qualified reader, observed a Category B opacity consistent with complicated pneumoconiosis. Claimant's Exhibit 3. The May 12, 2004 x-ray was interpreted by Drs. Alexander and Scatarige, both dually qualified readers. Dr. Scatarige found the film exhibited no large opacities and was negative for the presence of

[4] Dr. Hippensteel interpreted the June 2, 2004 x-ray as: right apical pneumothorax, 2 centimeter nodule in left upper lobe, consistent with sarcoidosis rather than coal workers' pneumoconiosis. Employer's Exhibit 10.

[5] A "B reader" is a physician who has demonstrated proficiency in classifying x-rays according to the ILO-U/C standards by successful completion of an examination established by the National Institute for Occupational Safety and Health. *See* 20 C.F.R. §717.202(a)(1)(ii)(E); 42 C.F.R. §37.51; *Mullins Coal Co., Inc., of Va. v. Director, OWCP*, 484 U.S. 135, 145 n.16, 11 BLR 2-1, 2-6 n.16 (1987), *reh'g denied*, 484 U.S. 1047 (1988); *Roberts v. Bethlehem Mines Corp.*, 8 BLR 1-211 (1985). A Board-certified radiologist is a physician who has been certified by the American Board of Radiology as having particular expertise in the field of radiology.

[6] The interpretations of the September 12, 2002 x-ray are contained in Director's Exhibit 37 and Claimant's Exhibit 3; interpretations of the May 12, 2004 x-ray are contained in Claimant's Exhibit 5 and Employer's Exhibit 1; and interpretations of the June 28, 2002 x-ray are contained in Director's Exhibits 15, 17, 35, 39.

pneumoconiosis, while Dr. Alexander found Category B large opacities.[7] Finally, the June 28, 2002 x-ray was interpreted by B reader Dr. Forehand as showing a Category B opacity, while B reader Dr. Hippensteel disagreed, stating that the film "does not look like either simple or complicated pneumoconiosis. With elevated ACE it is compatible with nodular sarcoidosis." A third interpretation of the June 28, 2002 film, by Dr. Goldstein, "simply reported multiple large nodules." Decision and Order at 8-9.

Based on the foregoing, the administrative law judge rationally found that the preponderance of the x-ray evidence failed to prove the presence of a large pulmonary opacity associated with pneumoconiosis. Decision and Order at 10. Moreover, he acted within his discretion in according more weight to the readings by physicians with superior radiological credentials. *See Chaffin v. Peter Cave Coal Co.*, 22 BLR 1-294, 1-302 (2003); *Worhach v. Director, OWCP*, 17 BLR 1-105, 1-108 (1993); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 21 BLR 2-269 (4th Cir. 1997); *see also Trent*, 11 BLR 1-26; *Dixon v. North Camp Coal Co.*, 8 BLR 1-344, 1-345-46 (1985); *Sheckler v. Clinchfield Coal Co.*, 7 BLR 1-128 (1984). Finally, in assessing and crediting the medical evidence, and resolving evidentiary conflicts, he validly credited evidence that the opacities demonstrated on x-ray failed to establish the presence of pneumoconiosis. *See generally Scarbro*, 220 F.3d at 256, 22 BLR at 2-101. Accordingly, substantial evidence supports the administrative law judge's determination that the x-ray evidence fails to establish the presence of complicated pneumoconiosis pursuant to Section 718.304(a), and it is affirmed. 20 C.F.R. §718.304(a).

Addressing the Board's directive to evaluate the additional categories of newly submitted evidence relevant to the issue of complicated pneumoconiosis, the administrative law judge next reviewed the biopsy evidence, CT scans and PET scan. However, because the needle biopsy performed on June 2, 2004, failed to provide an accurate diagnosis, *see* Claimant's Exhibit 4; Employer's Exhibit 10; Decision and Order at 10, the administrative law judge reasonably found that the biopsy evidence failed to establish the presence of massive fibrosis, as required under Section 718.304(b). 20 C.F.R. §718.304(b).

Regarding the three CT scans,[8] Dr. Mullens's interpretation of the CT scan of August 20, 2002, failed to specify whether the opacities observed were the equivalent of an x-ray opacity greater than one centimeter, or whether they were consistent with pneumoconiosis. Dr. Hippensteel's assessment of the CT scan of September 12, 2002

[7] Dr. Scatarige noted a 1.5 cm. mass, but identified no abnormalities consistent with pneumoconiosis. Employer's Exhibit 2; Decision and Order at 8.

[8] *See* Director's Exhibits 37, 38; Claimant's Exhibit 4; Employer's Exhibit 10.

failed to make an equivalency finding concerning the identified two-millimeter mass, and concluded that the mass was not consistent with pneumoconiosis. Employer's Exhibit 7 at 18. Finally, while both Drs. Mullens and Hippensteel interpreted the June 2, 2004 CT scan and identified a pulmonary mass, neither physician indicated its size, nor that the mass was consistent with pneumoconiosis. In particular, Dr. Hippensteel noted that the demonstrated changes were "much more consistent with a diagnosis of inflammation from sarcoidosis which affects both lung parenchyma and lymph nodes, rather than coal workers' pneumoconiosis." Employer's Exhibit 10. Likewise, both Drs. Mullens and Hippensteel agreed that the PET scan of May 10, 2004 showed lesions that could be associated with pneumoconiosis, but failed to identify any large pulmonary nodules. The administrative law judge therefore rationally determined that none of the foregoing medical tests established the presence of complicated pneumoconiosis under Section 718.304(c). Decision and Order at 12-13; *see Melnick*, 16 BLR 1-31; *see also* 20 C.F.R. §718.107(b). The administrative law judge therefore properly concluded that claimant failed to invoke the irrebuttable presumption of total disability under Section 718.304(a)-(c), and we affirm his findings thereunder as supported by substantial evidence.

If claimant proves the existence of a totally disabling respiratory or pulmonary impairment by means of newly submitted evidence, pursuant to Section 718.204, he can establish a change in an applicable condition of entitlement under Section 725.309. However, the administrative law judge accurately found that the objective pulmonary function study and arterial blood gas study results of record failed to meet the regulatory criteria for establishing total disability pursuant to Section 718.204(b)(2)(i), (ii), Decision and Order at 13-14, and the record contains no evidence of cor pulmonale with right-sided congestive heart failure pursuant to Section 718.204(b)(2)(iii), Decision and Order at 5.

Finally, the administrative law judge addressed the relevant medical opinions rendered by Drs. Robinette, Forehand, Hippensteel and McSharry, pursuant to Section 718.204(b)(2)(iv). The administrative law judge first ascertained that claimant's usual coal mine work as a roof bolt helper required heavy manual labor. Decision and Order at 15. He found that claimant's treating physician of ten years, Dr. Robinette, diagnosed complicated pneumoconiosis, yet never specifically found that claimant was totally disabled due to a respiratory impairment.[9] Decision and Order at 15-16, 21-23; Director's Exhibits 37, 38; Claimant's Exhibit 4. The administrative law judge found this omission to be "significant because [Dr. Robinette's] treatment notes presented conflicting evidence of an impairment." Decision and Order at 22. Specifically, the administrative law judge noted that although a physical examination revealed "(bilateral)

[9] Rather, Dr. Robinette stated that claimant is "obviously disabled from working on the basis of his complicated pneumoconiosis." Director's Exhibit 38.

wheezing and diminished breath sounds," Dr. Robinette's pulmonary function testing results were normal. Director's Exhibit 38. Further, the administrative law judge determined that Dr. Robinette's diagnosis was based on his x-ray interpretation, in contrast to the administrative law judge's finding that the x-ray evidence was negative for the existence of complicated pneumoconiosis. We conclude that the administrative law judge properly exercised his discretion in identifying deficiencies in Dr. Robinette's medical opinion, because it failed to render a diagnosis relevant to total disability. *Tedesco v. Director, OWCP*, 18 BLR 1-103 (1994). Next, the administrative law judge permissibly found the opinion insufficiently reasoned and documented as it was unsupported by its underlying data. Decision and Order at 22; *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989)(*en banc*); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *see also Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 533, 21 BLR 2-323, 2-335 (4th Cir. 1998). Accordingly, the administrative law judge provided specific reasons for choosing not to accord Dr. Robinette's opinion greater deference based his status as claimant's treating physician**.** *See* 20 C.F.R. §718.104(d)(5); *Consolidation Coal Co. v. Director, OWCP* [*Held*], 314 F.2d 184, 22 BLR 2-564 (4th Cir. 2002); *accord Nat'l Mining Ass'n v. U.S. Dep't of Labor*, 292 F.3d 849, 23 BLR 2-124 (D.C. Cir. 2002).

Additionally, Dr. Forehand's reasoning and documentation were found insufficient to support both his diagnosis of complicated pneumoconiosis caused by coal dust exposure, and his opinion that claimant is totally disabled from his usual coal mine work. Director's Exhibits 14, 16; *see also* June 9, 2004 Hearing Transcript at 34-36, 38. The administrative law judge determined that Dr. Forehand's diagnosis was based on an incorrect interpretation of the x-ray evidence, as well as normal pulmonary function and blood gas studies. Decision and Order at 16. The absence of a respiratory or pulmonary impairment, denoted by normal testing results, as here, can validly be considered by the administrative law judge**.** *See Mullins Coal Co., Inc. of Va. v. Director, OWCP*, 484 U.S. 135, 11 BLR 2-1 (1987), *reh'g denied*, 484 U.S. 1047 (1988); *Usury v. Turner Elkhorn Mining Co.*, 428 U.S. 1 (1976). Therefore, the administrative law judge rationally accorded Dr. Forehand's opinion "diminished probative value." Decision and Order at 22; *see generally Arnoni v. Director, OWCP*, 6 BLR 1-423 (1983).

In contrast, the administrative law judge determined that both Drs. McSharry and Hippensteel, physicians who are Board-certified in internal medicine, pulmonary disease, and critical care, provided reasoned, documented and probative medical opinions that the clamant is not totally disabled by a respiratory or pulmonary impairment. Employer's Exhibits 7 at 32-33, 8 at 5, 6, 9. The administrative law judge determined that the opinions of both physicians, that claimant could perform his usual coal mine work, are supported by the preponderance of the x-ray evidence, which was negative for complicated pneumoconiosis, as well as by the normal results on pulmonary function and arterial blood gas testing. Further, the administrative law judge specifically noted that

both Drs. McSharry and Hippensteel were aware that claimant's usual coal mine work required heavy manual labor. *See* Employer's Exhibits 7 at 6, 8 at 5, 9. The administrative law judge therefore reasonably chose to credit the "probative consensus" provided by Drs. Hippensteel and McSharry, as the most consistent with all of the medical evidence of record. Decision and Order at 22-23; *see Minnich v. Pagnotti Enterprises, Inc.*, 9 BLR 1-89, 1-90 n.1 (1986); *Wetzel v. Director, OWCP*, 8 BLR 1-139 (1985); *accord Hicks*, 138 F.3d 524, 21 BLR 2-323; *Church v. Eastern Assoc. Coal Co.*, 21 BLR 10-8 (1996). The administrative law judge's findings pursuant to Section 718.204(b)(2) are supported by substantial evidence, and are affirmed. Consequently, we affirm the administrative law judge's determination that the relevant evidence fails to demonstrate a change in an applicable condition of entitlement pursuant to Section 725.309(d), and his finding that claimant is precluded from entitlement to benefits. *White*, 23 BLR at 1-3.

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

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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BETTY JEAN HALL
Administrative Appeals Judge