BRB No. 07-0333 BLA

G.M.	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	DATE ISSUED: 01/17/2008
	)	
DOMINION COAL CORPORATION	)	
	)	
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 - Awarding Benefits of Stephen L. Purcell, Administrative Law Judge, United States Department of Labor.

G.M., Oakwood, Virginia, *pro se.*

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

Rita Roppolo (Gregory F. Jacob, Solicitor of Labor; Allen H. Feldman, 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: DOLDER, Chief Administrative Appeals Judge, SMITH and HALL, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order - Awarding Benefits (05-BLA-0070) of Administrative Law Judge Stephen L. Purcell rendered on a 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] This case involves claimant's request for modification of a duplicate claim filed on August 25, 1999.[2] Claimant's duplicate claim was denied by Administrative Law Judge Mollie W. Neal because claimant did not establish a material change in conditions by establishing either the existence of complicated pneumoconiosis, or that his total disability was due to pneumoconiosis. Director's Exhibit 43. Pursuant to claimant's appeal, the Board affirmed the denial of benefits. *[G.M.] v. Dominion Coal Corp.*, BRB No. 01-0849 BLA (June 28, 2002)(unpub.). On June 5, 2003, claimant requested modification of the denial of the duplicate claim.

The administrative law judge found that, based on the new evidence submitted on modification, claimant established a material change in conditions by establishing the existence of complicated pneumoconiosis, thereby entitling him to the irrebuttable presumption of total disability due to pneumoconiosis pursuant to 20 C.F.R. §718.304. *See* 20 C.F.R. §725.309(d)(2000). Specifically, the administrative law judge found that, although the biopsy evidence did not establish complicated pneumoconiosis at 20 C.F.R. §718.304(b), the x-ray and medical opinion evidence established complicated pneumoconiosis at 20 C.F.R. §718.304(a), (c), respectively. The administrative law judge awarded benefits, finding that claimant established all elements of entitlement upon a review of the entire record. The administrative law judge awarded benefits commencing as of August 1999, the month in which claimant filed his duplicate claim.

On appeal, employer challenges the administrative law judge's finding that claimant established a material change in conditions at Section 725.309(d)(2000) by

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[1] 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 (2002). All citations to the regulations, unless otherwise noted, refer to the amended regulations.

[2] Claimant filed his first claim on March 2, 1982, which was denied on August 31, 1988, because claimant did not establish that he was totally disabled by a respiratory or pulmonary impairment, due to pneumoconiosis. *[G.M.] v. Dominion Coal Corp.*, BRB No. 87-0418 BLA (Aug. 31, 1988)(unpub.). Subsequently, claimant requested modification on May 2, 1989, which was denied on February 10, 1992, because claimant did not establish total disability or total disability due to pneumoconiosis. Claimant filed a second modification request on December 22, 1992, which was denied on June 26, 1995, because although claimant established that he was totally disabled by a respiratory or pulmonary impairment, he did not establish that the total disability was due to pneumoconiosis.

establishing complicated pneumoconiosis pursuant to Section 718.304(a), (c). Employer also challenges the administrative law judge's onset date determination. Claimant, without the assistance of counsel, responds in support of the award of benefits.[3] The Director, Office of Workers' Compensation Programs (the Director), has filed a limited response urging the Board to reject employer's arguments that the administrative law judge erred in failing to consider evidence from claimant's first claim in determining whether a material change in conditions was established, and erred in failing to require claimant to prove that his pneumoconiosis actually progressed. Employer has filed a reply brief reiterating its arguments on appeal.

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. 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).

In this duplicate claim filed on August 25, 1999, claimant must establish a material change in conditions pursuant to 20 C.F.R. §725.309(d)(2000), since the denial of his first claim. In *Lisa Lee Mines v. Director, OWCP* [*Rutter*], 86 F.3d 1358, 20 BLR 2-227 (4th Cir. 1996)(*en banc*), the United States Court of Appeals for the Fourth Circuit held that in order to establish a material change in conditions, claimant must establish by a preponderance of the evidence developed subsequent to the denial of the prior claim, at least one of the elements of entitlement previously adjudicated against him.[4] Claimant's first claim was denied because he did not establish that he was totally disabled due to pneumoconiosis. Thus, the evidence developed in this claim must establish the disability causation element for claimant to obtain review of the merits of his claim. In considering a request for modification of the denial of a duplicate claim (which, as here, has been denied based upon a failure to establish a material change in conditions), an administrative law judge must determine whether all of the evidence developed in the duplicate claim, including any new evidence submitted with the request for modification, establishes a material change in conditions. *See* 20 C.F.R. §725.309(d) (2000); *Betty B*

[3] We reject employer's argument that claimant's response brief is defective and must be stricken. The Board has the discretion to accept briefs that are not in formal compliance with its procedural rules in *pro se* cases, *see* 20 C.F.R. §802.211(e), and employer has not shown that claimant is represented by counsel or a lay representative.

[4] The Board will apply the law of the United States Court of Appeals for the Fourth Circuit, as the claimant was last employed in the coal mine industry in Virginia. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989)(*en banc*); Director's Exhibits 2, 4.

Coal Co. v. Director, OWCP [*Stanley*], 194 F.3d 491, 22 BLR 2-1 (4th Cir. 1999); *Hess v. Director, OWCP*, 21 BLR 1-141, 1-143 (1998). If the evidence establishes a material change in conditions, the administrative law judge must then consider the merits of the duplicate claim. *Hess*, 21 BLR at 1-143.

Employer first argues that the administrative law judge applied an improper legal standard for modifying this duplicate claim because he did not consider whether all of the relevant evidence in the duplicate claim established a material change in conditions since the denial of claimant's first claim on June 26, 1995. We agree.

In his analysis of the medical evidence, the administrative law judge considered the evidence submitted since Judge Neal denied claimant's duplicate claim on June 28, 2001. Decision and Order at 5. Specifically, the administrative law judge summarized the x-rays dated February 5, 2002, March 24, 2003, and September 26, 2003, Decision and Order at 5-7, as well as the pulmonary function studies dated February 4, 2002, May 13, 2003, and September 26, 2003, and the blood gas study dated September 26, 2003. Decision and Order at 8. The administrative law judge additionally summarized the reports of Dr. Iosif dated May 15, 2003, and December 24, 2003, Decision and Order at 8-9, the report of Dr. Fino dated October 14, 2003 and his deposition on March 27, 2006, Decision and Order at 9-11, and the report of Dr. Castle dated April 5, 2004 and his deposition on January 6, 2006. Decision and Order at 11-13. The administrative law judge also summarized Dr. Crouch's January 4, 2005 report, Decision and Order at 13-14, Dr. Perper's December 27, 2005 report, Decision and Order at 14-15, and the interpretations by Drs. McClane, Scott, and Wheeler of the November 13, 2003 chest CT scan, as well as the interpretation by Dr. Hallo of the December 11, 2003 chest CT scan and the right lung biopsy performed by Dr. Iosif on December 11, 2003. Decision and Order at 15-16.

In finding that claimant established the existence of complicated pneumoconiosis, the administrative law judge relied on the numerical superiority of the positive readings of the x-rays dated February 5, 2002 and March 24, 2003. Decision and Order at 20. The administrative law judge then found that the preponderance of the medical opinion evidence supported a finding of complicated pneumoconiosis. Decision and Order at 25-26.

As employer contends, the administrative law judge did not properly determine whether claimant established a material change in conditions since the denial of his first claim. Rather, the administrative law judge considered whether the new evidence submitted on modification since Judge Neal's denial of claimant's current duplicate claim on June 28, 2001, established complicated pneumoconiosis. The issue before the administrative law judge, however, was whether all the evidence submitted in the current duplicate claim, in conjunction with the evidence submitted on modification, established

a material change in conditions since the denial of claimant's first claim on June 26, 1995. *See Rutter*, 86 F.3d at 1358, 20 BLR at 2-227; *White v. New White Coal Co.*, 23 BLR 1-1, 1-3 (2004). In weighing only the evidence submitted since the denial of claimant's duplicate claim on June 28, 2001, the administrative law judge did not consider all relevant evidence. Although the administrative law judge stated that he would accord greater weight to the more recent positive x-ray readings than to the readings that were previously weighed by Judge Neal, as we discuss below, the administrative law judge improperly based his Section 718.304 finding on a numerical tally of the recent positive readings, and he did not consider the readings of the September 26, 2003 x-ray, relevant to the existence of complicated pneumoconiosis. Consequently, we must vacate the administrative law judge's findings pursuant to Sections 718.304, 725.309(d)(2000), and 20 C.F.R. §725.310(2000), and remand this case to the administrative law judge for reconsideration. On remand, the administrative law judge must consider whether the evidence initially submitted in claimant's second claim, in conjunction with the evidence submitted on modification, establishes a material change in conditions.[5] *See Stanley*, 194 F.3d at 499, 22 BLR 2-13; *Hess*, 21 BLR at 1-143.

We further agree with employer that the administrative law judge erred in weighing the medical evidence as to the existence of complicated pneumoconiosis.

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 that would yield results equivalent to (A) or (B). 30 U.S.C. §921(c)(3); 20 C.F.R. §718.304.[6] The introduction of

[5] However, we reject employer's arguments that the administrative law judge must consider the evidence from claimant's first claim in determining whether a material change in conditions is established, and that claimant must prove separately that his pneumoconiosis actually progressed. *See Lisa Lee Mines v. Director, OWCP [Rutter]*, 86 F.3d 1358, 1362, 20 BLR 2-227, 2-235 (4th Cir. 1996)(*en banc*); *Parsons v. Wolf Creek Collieries*, 23 BLR 1-29, 1-34 (2004)(McGranery, J., concurring and dissenting); *Lester v. Director, OWCP*, 993 F.2d 1143, 1146, 17 BLR 2-114, 2-118 (4th Cir. 1993).

[6] Section 718.304 provides in relevant part:

There is an irrebuttable presumption that a miner is totally disabled due to pneumoconiosis . . . if such miner is suffering . . . from a chronic dust disease of the lung which:

legally sufficient evidence of complicated pneumoconiosis does not automatically qualify a claimant for the irrebuttable presumption found at Section 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 conflict, and make a finding of fact. *Melnick v. Consolidation Coal Co.*, 16 BLR 1-31, 1-33 (1991)(*en banc); Truitt v. North Am. Coal Corp.*, 2 BLR 1-199, 1-203 (1979), *aff'd sub nom. Director, OWCP v. North Am. Coal Corp.*, 626 F.2d 1137, 2 BLR 2-45 (3d Cir. 1980).

With regard to Section 718.304(a), employer argues that the administrative law judge erred in relying on the numerical superiority of the x-ray readings that were positive for complicated pneumoconiosis, and erred by failing to weigh the readings of the September 26, 2003 x-ray. We agree. The administrative law judge found that complicated pneumoconiosis was established by x-ray based on the numerical superiority of the positive readings of the x-rays dated February 5, 2002 and March 24, 2003. In so finding, the administrative law judge improperly relied on a head count of the physicians interpreting the x-rays rather than a qualitative analysis of the x-ray evidence. *See Adkins v. Director, OWCP*, 958 F.2d 49, 16 BLR 2-61 (4th Cir. 1992). Moreover, the administrative law judge did not consider the conflicting readings of the September 26, 2003 x-ray.[7] *See* 30 U.S.C. §923(b). On remand, the administrative law judge must

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> (a) When diagnosed by chest X-ray . . . yields one or more large opacities (greater than 1 centimeter in diameter) and would be classified in Category A, B, or C . . .; or
>
> (b) When diagnosed by biopsy or autopsy, yields massive lesions in the lung; or
>
> (c) When diagnosed by means other than those specified in paragraphs (a) and (b) of this section, would be a condition which could reasonably be expected to yield the results described in paragraph (a) or (b) of this section had diagnosis been made as therein described: *Provided, however,* That any diagnosis made under this paragraph shall accord with acceptable medical procedures.

20 C.F.R. §718.304.

[7] The September 26, 2003 x-ray was interpreted by Dr. Alexander, who is a Board-certified radiologist and B reader, as positive for both simple and complicated pneumoconiosis. Director's Exhibit 107. Drs. Scott and Wheeler, who are Board-certified radiologists and B readers, interpreted the same x-ray as negative for both

discuss and weigh all readings of the relevant x-rays in light of the physicians' radiological qualifications. *See Sharpe v. Director, OWCP*, 495 F.3d 125, 134 n.16, 24 BLR 2-56, 2-70, 2-71 n.16 (4th Cir. 2007); *Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 532, 21 BLR 2-323, 2-334 (4th Cir. 1998).

With regard to Section 718.304(c), as employer argues, the administrative law judge erred by crediting Dr. Iosif's opinion merely because he is claimant's treating physician. *See Consolidation Coal Co. v. Held*, 314 F.3d 184, 22 BLR 2-564 (4th Cir. 2002). Further, as employer contends, although the administrative law judge discounted the opinions of Drs. Fino and Castle as to the etiology of the opacities in claimant's lungs, substantial evidence does not support his finding that Drs. Fino and Castle attributed the opacities to asbestos exposure, and that Dr. Fino also attributed the opacities to granulomatous disease. Additionally, we note that the administrative law judge improperly considered the x-ray interpretations of Drs. Scott and Wheeler at Section 718.304(c); x-ray evidence is considered at Section 718.304(a). *See* 20 C.F.R. §718.304(a), (c); *Hicks*, 138 F.3d at 532-533, 21 BLR at 2-334-2-335; *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 441-442, 21 BLR 2-269, 2-274-2-276 (4th Cir. 1997).

Based on the foregoing, we remand this case to the administrative law judge for reconsideration. On remand, the administrative law judge must discuss and weigh all relevant evidence in determining whether claimant established complicated pneumoconiosis at Section 718.304. *See Eastern Associated Coal Corp. v. Director, OWCP* [*Scarbro*], 220 F.3d 250, 256, 22 BLR 2-93, 2-101 (4th Cir. 2000); *Lester v. Director, OWCP*, 993 F.2d 1143, 1145, 17 BLR 2-114, 2-117 (4th Cir. 1993); *Melnick*, 16 BLR at 1-33.

Additionally, we address employer's contention that the administrative law judge erred in determining that benefits commence as of August 1999. Employer argues that, if entitlement is established, benefits are payable only from the month in which claimant requested modification. Employer's Brief at 37. Contrary to employer's argument, the applicable regulation provides that if a claim is awarded through modification based on a mistake in fact, benefits are payable beginning with the month of onset of total disability due to pneumoconiosis arising out of coal mine employment, or, if the evidence does not establish the month of onset, from the month in which claimant filed his claim.[8] 20

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simple and complicated pneumoconiosis. Director's Exhibit 70. Dr. Fino, a B reader, read the x-ray as positive for simple pneumoconiosis, but negative for complicated pneumoconiosis. Director's Exhibit 69.

[8] While a similar method of determining the date from which benefits are payable applies when a claim is awarded through modification based on a change in conditions, the regulation contains the additional proviso that "no benefits shall be payable for any month prior to the effective date of the most recent denial." 20 C.F.R. §725.503(d)(2).

C.F.R. §725.503(d)(1). However, because we herein vacate the administrative law judge's finding of entitlement to benefits, we similarly vacate his finding as to the date from which benefits commence. If, on remand, the administrative law judge finds that claimant establishes entitlement to benefits, then he must again determine the date from which benefits commence. *See generally Williams v. Director, OWCP*, 13 BLR 1-28, 1-30 (1989).

Finally, we note that in adjudicating claimant's modification request, the administrative law judge, on remand, should, in exercising his discretion, consider whether reopening this case renders justice under the Act. *See Sharpe*, 495 F.3d at 134, 24 BLR at 2-70.

Accordingly, the administrative law judge's Decision and Order - Awarding Benefits is vacated, and the case is remanded to the administrative law judge for reconsideration consistent with this opinion.

SO ORDERED.

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NANCY S. DOLDER, Chief
Administrative Appeals Judge

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ROY P. SMITH
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge