BRB No. 07-0267 BLA

A.R.	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
PEERLESS EAGLE COAL COMPANY	)	DATE ISSUED: 11/23/2007
	)	
and	)	
	)	
A.T. MASSEY	)	
	)	
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 of Jeffrey Tureck, Administrative Law Judge, United States Department of Labor.

Frederick K. Muth (Hensley, Muth, Garton & Hayes), Bluefield, West Virginia, for claimant.

William S. Mattingly (Jackson Kelly PLLC), Morgantown, West Virginia, for employer.

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

PER CURIAM:

Employer appeals the Decision and Order (05-BLA-5296) of Administrative Law Judge Jeffrey Tureck (the administrative law judge) awarding benefits 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).[1] The administrative law judge noted that "[c]laimant worked as an underground coal miner for most of the period between 1947 and 1989," Decision and Order at 2, and adjudicated this claim pursuant to the regulations contained in 20 C.F.R. Part 718. The administrative law judge found that the evidence established the presence of complicated pneumoconiosis, and thereby established invocation of the irrebuttable presumption of total disability due to pneumoconiosis pursuant to 20 C.F.R. §718.304. Consequently, the administrative law judge found that the evidence established a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309(d). Accordingly, the administrative law judge awarded benefits.

On appeal, employer challenges the administrative law judge's finding that the evidence established invocation of the irrebuttable presumption of total disability due to pneumoconiosis at 20 C.F.R. §718.304. Employer also contends that the administrative law judge erred in excluding the readings by Drs. Scott and Scatarige of x-rays taken on May 6, 2003 and March 2, 2004. Claimant responds, urging affirmance of the administrative law judge's Decision and Order. The Director, Office of Workers' Compensation Programs, has declined to participate in this 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 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).

[1] Claimant filed his first claim on May 16, 1973. Director's Exhibit 1. It was finally denied on September 22, 1980, because the evidence did not establish that claimant was totally disabled. *Id*. Claimant filed his second claim on September 29, 1981. Director's Exhibit 2. It was finally denied on February 9, 1983, because the evidence did not establish that claimant was totally disabled. *Id*. Claimant filed his third claim on October 19, 1999. Director's Exhibit 3. It was finally denied on November 26, 2002, because the evidence did not establish that claimant was totally disabled. *Id*. Claimant filed his most recent claim on December 18, 2002. Director's Exhibit 5.

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). Claimant's prior claim was denied because he failed to establish that he was totally disabled. Director's Exhibits 1-3. Consequently, claimant had to submit new evidence establishing this element of entitlement to obtain review of the merits of his claim. *See* 20 C.F.R. §725.309(d)(2), (3).

Employer initially contends that the administrative law judge erred in finding that the x-ray evidence established the presence of complicated pneumoconiosis at 20 C.F.R. §718.304(a), because the administrative law judge considered x-ray readings from the miner's previous claims. The administrative law judge initially considered ten interpretations of four new x-rays dated May 6, 2003, March 2, 2004,[2] June 8, 2004, and June 28, 2004. A physician, whose name could not be read from the report, stated that the May 6, 2003 x-ray showed possible simple pneumoconiosis and possible pulmonary mass lesions.[3] Director's Exhibit 22. Dr. Wheeler, who was dually qualified as a B reader and a Board-certified radiologist, read the May 6, 2003 x-ray as negative for pneumoconiosis. Employer's Exhibit 2. Dr. Patel, a dually qualified radiologist, read the March 2, 2004 x-ray as positive for both simple and complicated pneumoconiosis, Director's Exhibit 20, while Dr. Wheeler, a dually qualified radiologist, and Dr. Zaldivar, a B reader, read this x-ray as negative for both simple and complicated pneumoconiosis. Director's Exhibit 32; Employer's Exhibit 1. Dr. Aycoth, a B reader, and Dr. Cappiello, a dually qualified radiologist, read the June 8, 2004 x-ray as positive for both simple and complicated pneumoconiosis. Claimant's Exhibit 1. Dr. Spitz, a B reader, read the June 8, 2004 x-ray as positive for simple pneumoconiosis and negative for complicated pneumoconiosis. Employer's Exhibit 5. Drs. Scott and Wheeler, dually qualified radiologists, read the June 28, 2004 x-ray as negative for pneumoconiosis. Director's Exhibit 33; Employer's Exhibit 2.

The administrative law judge stated that, if this were all of the evidence of record, he would find that the x-ray evidence failed to establish the presence of complicated

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[2] Dr. Binns, who was dually qualified as a B reader and Board-certified radiologist, read the March 2, 2004 x-ray for its quality only. Director's Exhibit 21.

[3] The administrative law judge stated that "[a] diagnosis of 'possible' pneumoconiosis or progressive massive fibrosis is not a probative diagnosis." Decision and Order at 3 n.5.

pneumoconiosis, based on his giving greatest weight to the negative readings of Drs. Wheeler, Scott, and Zaldivar. Decision and Order at 4. However, the administrative law judge found that the x-ray evidence established the existence of simple pneumoconiosis, when all of the x-ray evidence of record was considered. *Id*. The administrative law judge gave little weight to the x-ray readings by Drs. Wheeler, Scott, and Zaldivar, which were negative for complicated pneumoconiosis, because they were also negative for simple pneumoconiosis. *Id*. The administrative law judge then found that the x-ray readings by Drs. Patel, Aycoth, and Cappiello established that the x-ray evidence was positive for complicated pneumoconiosis, because (1) other doctors indicated that claimant has a mass in the upper lobe of his right lung that was not there at the time that the prior claim was denied; (2) there was no evidence contradicting the x-ray readings by Drs. Patel, Aycoth, and Cappiello that showed Category A large opacities;[4] and (3) the comments of Drs. Spitz and Bellotte, regarding a nodular density that may represent a malignant neoplasm of the lungs and nodules for which malignancy and tuberculosis needed to be ruled out, were not definitive statements that the x-rays did not indicate the presence of complicated pneumoconiosis. *Id*. at 4-5.

Employer argues that the administrative law judge applied the wrong legal standard in weighing the x-ray evidence. Employer maintains that "the [administrative law judge] may not stray from the 'new evidence' submitted with the subsequent claim in considering the threshold issue of whether a change in condition has been proven." Employer's Brief at 11. We agree. The administrative law judge initially considered only the x-ray readings developed since the prior denial of benefits. Decision and Order at 3. However, as noted above, he further stated:

> If this was all the evidence in the record, I would find that the x-ray evidence fails to prove that the claimant has complicated pneumoconiosis, since I would give the greatest weight to the opinions of Drs. Wheeler, Spitz and Scott. But the evidence submitted with this subsequent claim should not be considered in a vacuum; and the record compiled in the miner's previous claims contains numerous readings of x-rays taken from 1973 through 2001. While about twice as many of these earlier x-rays are

[4] The administrative law judge found that "[s]ince none of the other doctors [Drs. Zaldivar and Spitz] indicated how large the mass in claimant's upper right lobe was, there is no evidence contradicting the finding of a [C]ategory A opacity, *i.e.*, an opacity larger than one centimeter but smaller than five centimeters in diameter…." Decision and Order at 4-5. Contrary to the administrative law judge's finding, Dr. Zaldivar classified the March 2, 2004 x-ray as Category "0" for large opacities, Employer's Exhibit 1, and Dr. Spitz classified the June 8, 2004 x-ray as Category "0" for large opacities, thereby indicating that no large opacities were present. Employer's Exhibit 5.

> negative than positive for simple pneumoconiosis, what is noteworthy is that three doctors providing reports or testimony on behalf of the employer for the miner's 1999 claim thought the claimant was suffering from simple pneumoconiosis.

Id. at 4. Based on the administrative law judge's consideration of previously submitted x-ray readings, the administrative law judge concluded that claimant has simple pneumoconiosis.[5] *Id.* The administrative law judge then discounted the x-ray readings by Drs. Wheeler, Scott, and Zaldivar regarding complicated pneumoconiosis, "since Drs. Wheeler, Scott and Zaldivar found that the miner does not have even simple pneumoconiosis, and a diagnosis of simple pneumoconiosis is necessary before a diagnosis of complicated pneumoconiosis can be made (*see* EX 6, at 8-10)…." *Id.*

The pertinent regulation provides that "[i]f the applicable condition(s) of entitlement relate to the miner's physical condition, the subsequent claim may be approved only if *new evidence* submitted in connection with the subsequent claim establishes at least one applicable condition of entitlement." 20 C.F.R. §725.309(d)(3) (emphasis added).

In the instant case, the administrative law judge did not confine his analysis of the issue of complicated pneumoconiosis to the evidence developed since the prior denial of benefits. *See White v. New White Coal Co*., 23 BLR 1-1, 1-3 (2004). Rather, the administrative law judge relied on both the old and new evidence to establish the presence of complicated pneumoconiosis, and thereby, invocation of the irrebuttable presumption of total disability due to pneumoconiosis at 20 C.F.R. §718.304. Thus, we vacate the administrative law judge's finding that the evidence established a change in an applicable condition of entitlement at 20 C.F.R. §725.309(d), and remand the case for further consideration of the new evidence thereunder. *See Perry v. Mynu Coals, Inc*., 469 F.3d 360, 23 BLR 2-374 (4th Cir. 2006); *Eastern Associated Coal Corp. v. Director, OWCP* [*Scarbro*], 220 F.3d 250, 22 BLR 2-93 (4th Cir. 2000); *see also Daniels Co. v. Mitchell*, 479 F.3d 321, 24 BLR 2-1 (4th Cir. 2007)(holding that the miner must also establish that his complicated pneumoconiosis arose out of coal mine employment). If, on remand, the administrative law judge finds that the new evidence establishes a change in an applicable condition of entitlement at 20 C.F.R. §725.309(d), he must consider all of the evidence of record on the merits.

[5] The record reflects that, in denying the prior claims, neither the district director nor Administrative Law Judge Gerald M. Tierney found that claimant established the existence of pneumoconiosis. Director's Exhibits 1-3.

Next, citing *Elm Grove Coal Co. v. Director, OWCP* [*Blake*], 480 F.3d 278, 23 BLR 2-430 (4th Cir. 2007), employer contends that the administrative law judge erred in rejecting its proffer of readings by Drs. Scott and Scatarige of x-rays taken on May 6, 2003 and March 2, 2004. Employer maintains that, under *Blake*, it was entitled to have these additional x-ray readings received in the record as piece-for-piece rebuttal of claimant's case. In *Blake*, the United States Court of Appeals for the Fourth Circuit, within whose jurisdiction this case arises, held that 20 C.F.R. §725.414(a)(2)(ii),(3)(ii) authorizes each party to submit one rebuttal x-ray interpretation for each x-ray interpretation that the opposing party submits in its affirmative case, even if the two affirmative-case interpretations are of the same x-ray. *Blake*, 480 F.3d at 298, 23 BLR at 2-462-463.

Here, claimant submitted two affirmative-case readings by Drs. Aycoth and Cappiello of an x-ray dated June 8, 2004. Claimant's Exhibit 1. Employer was therefore entitled to submit a reading in rebuttal to each of those two readings. *Blake*, 480 F.3d at 298, 23 BLR at 2-462-463; *see also Ward v. Consolidation Coal Co.*, 23 BLR 1-151, 1-155 (2006). Employer offered Dr. Spitz's reading of the June 8, 2004 x-ray in rebuttal, and the administrative law judge admitted Dr. Spitz's reading. Hearing Transcript at 8, 10-11. However, employer never offered a second rebuttal reading of the June 8, 2004 x-ray.

Instead, employer offered readings by Drs. Scott and Scatarige of different x-rays, taken on May 6, 2003 and March 2, 2004, and argued, in response to claimant's objection, that good cause justified their admission in excess of employer's evidentiary limitations. The administrative law judge was not persuaded, and excluded Employer's Exhibit 3 containing these x-ray readings. Hearing Transcript (Tr.) at 13. A review of the record reveals that the administrative law judge admitted the reading by Dr. Wheeler of the May 6, 2003 x-ray that was negative for pneumoconiosis, submitted by employer in rebuttal to the hospital x-ray reading that was submitted by claimant. Tr. at 9-10; Director's Exhibit 22; Employer's Exhibit 2. Further, the administrative law judge admitted the readings by Drs. Zaldivar and Wheeler, submitted by employer of the March 2, 2004 x-ray, which were negative for both simple and complicated pneumoconiosis.[6] Director's Exhibit 32; Employer's Exhibit 1. Based on employer's designations of its evidence, and upon review of the administrative law judge's rulings, we conclude that the administrative law judge did not prevent employer from submitting piece-for-piece

[6] Employer offered Dr. Zaldivar's negative reading of the March 2, 2004 x-ray in support of its affirmative case, and Dr. Wheeler's negative reading as rebuttal to Dr. Patel's positive reading of this x-ray, submitted as part of the pulmonary evaluation provided by the Department of Labor. Hearing Transcript at 9; Employer's Exhibit 1.

rebuttal to claimant's two affirmative-case readings of the June 8, 2004 x-ray. We therefore reject employer's allegation of error.

In sum, the case is remanded to the administrative law judge to consider whether the new evidence establishes a change in an applicable condition of entitlement at 20 C.F.R. §725.309(d). If, on remand, the administrative law judge finds that the new evidence establishes a change in an applicable condition of entitlement at 20 C.F.R. §725.309(d), he must then consider whether all the evidence establishes entitlement to benefits on the merits.

Accordingly, the administrative law judge's Decision and Order awarding benefits is vacated, and the case is remanded to the administrative law judge for further consideration 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