BRB No. 05-0988 BLA

CHARLES W. HUDSON	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
PEABODY COAL COMPANY	)	
	)	DATE ISSUED: 08/30/2006
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 Denying Benefits on Subsequent Claim and the Order Declining to Vacate Decision and Order Denying Benefits on Subsequent Claim of Janice K. Bullard, Administrative Law Judge, United States Department of Labor.

James M. Phemister (Washington and Lee University School of Law, Legal Clinic), Lexington, Virginia, for claimant.

Laura Metcoff Klaus (Greenberg Traurig LLP), Washington, D.C., for employer.

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

PER CURIAM:

Claimant appeals the Decision and Order Denying Benefits on Subsequent Claim and the Order Declining to Vacate Decision and Order Denying Benefits on Subsequent Claim (03-BLA-5056) of Administrative Law Judge Janice K. Bullard 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). Claimant's initial claim for benefits, filed on February 23, 1970, was ultimately denied by the Department of Labor on July 29, 1981 because claimant did not establish any element of entitlement.

Director's Exhibit 1. Claimant filed his current claim for benefits on January 24, 2001. Director's Exhibit 3.

The administrative law judge credited claimant with 45.93 years of coal mine employment[1] and found that employer is the responsible operator. The administrative law judge found that the medical evidence developed since the prior denial of benefits did not establish the existence of complicated pneumoconiosis, but did establish the existence of simple pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.202(a), 718.203(b). The administrative law judge therefore concluded that claimant demonstrated a change in an applicable condition of entitlement as required by 20 C.F.R. §725.309(d). *See White v. New White Coal Co.*, 23 BLR 1-1, 1-3 (2004). However, the administrative law judge determined that claimant did not establish that he is totally disabled by a respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(b)(2). Accordingly, the administrative law judge denied benefits. On August 12, 2005, the administrative law judge denied claimant's motion for reconsideration of her finding that claimant did not establish the existence of complicated pneumoconiosis and was therefore ineligible for the irrebuttable presumption of total disability due to pneumoconiosis at 20 C.F.R. §718.304.

On appeal, claimant contends that the administrative law judge erred in her analysis of the medical evidence when she found that claimant did not establish invocation of the irrebuttable presumption of total disability due to pneumoconiosis pursuant to 20 C.F.R. §718.304. Claimant argues further that the administrative law judge did not provide a rationale for finding that the medical opinion evidence did not establish that claimant is totally disabled. Employer responds, urging affirmance of the administrative law judge's denial of benefits. The Director, Office of Workers' Compensation Programs, has declined to file a substantive response to claimant's appeal. Claimant has filed a reply brief reiterating his contentions.

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).

[1] The record indicates that claimant's coal mine employment occurred in West Virginia. Director's Exhibit 4. Accordingly, this case this case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989)(*en banc*).

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 a finding of 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).

Pursuant to 20 C.F.R. §718.304(a), claimant contends that the administrative law judge erred in weighing the x-ray evidence when she found that claimant did not establish the existence of complicated pneumoconiosis. Specifically, claimant asserts that the administrative law judge based her finding solely on a count of the number of doctors who diagnosed simple pneumoconiosis as opposed to complicated pneumoconiosis. We disagree.

Section 411(c)(3)(A) of the Act, implemented by 20 C.F.R. §718.304(a) of the regulations, provides in relevant part 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, 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. 30 U.S.C. §921(c)(3)(A); 20 C.F.R. §718.304(a). When weighing conflicting x-ray readings, the administrative law judge must consider the radiological qualifications of the physicians interpreting the x-rays. 20 C.F.R. §718.202(a)(1); *Adkins v. Director, OWCP*, 958 F.2d 49, 52, 16 BLR 2-61, 2-65-66 (4th Cir. 1992). Additionally, 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 consider all relevant evidence. *Lester v. Director, OWCP*, 993 F.2d 1143, 1145-46, 17 BLR 2-114, 2-117-18 (4th Cir. 1993); *Melnick v. Consolidation Coal Co*., 16 BLR 1-31, 1-33-34 (1991)(*en banc*).

In the case at bar, the administrative law judge considered the readings of five x-rays in light of the readers' radiological qualifications. The administrative law judge permissibly found the July 9, 1980 x-ray inconclusive because it was read as positive for simple pneumoconiosis by Dr. Alexander, a Board-certified radiologist and B-reader, but classified as unreadable by Dr. Wheeler, "a similarly qualified radiologist." Decision and Order at 18; *see Adkins*, 958 F.2d at 52, 16 BLR at 2-65-66. Because the March 27, 2001 x-ray was read as positive for simple pneumoconiosis by Dr. Alexander and by Dr. Ranavaya, a B-reader, the administrative law judge found Dr. Wheeler's negative reading outweighed and reasonably found the March 27, 2001 x-ray positive for simple pneumoconiosis. *Id*. The administrative law judge permissibly found that the next x-ray, taken on May 16, 2001, "support[ed] a finding of simple pneumoconiosis only," because although Dr. Alexander read the x-ray as positive for both simple pneumoconiosis and category "A" large opacities, Dr. Wheeler, "a similarly-qualified radiologist," read the x-

ray as positive for simple pneumoconiosis only. *Id*. The administrative law judge rationally determined that the final two x-rays, taken on February 7, 2003 and July 14, 2004, were "in equipoise" because Dr. Alexander's positive readings for both simple pneumoconiosis and category "A" large opacities were countered by Dr. Wheeler's "similarly-qualified" negative readings. Decision and Order at 18; *see Director, OWCP v. Greenwich Collieries* [*Ondecko*], 512 U.S. 267, 18 BLR 2A-1 (1994); *Adkins*, 958 F.2d at 52, 16 BLR at 2-65-66.

After considering each x-ray based on the readers' radiological qualifications, the administrative law judge found that the x-ray evidence as a whole "weighs in favor of a positive finding of simple pneumoconiosis." Decision and Order at 18. She explained that she so found because the March 27 and May 16, 2001 x-rays were positive for simple pneumoconiosis, while the remaining three x-rays were in equipoise. *Id*. While claimant focuses solely on the administrative law judge's comment that more physicians who read claimant's x-rays as positive detected simple pneumoconiosis, a review of the entire discussion and analysis provided by the administrative law judge indicates that she conducted a proper qualitative analysis of the conflicting x-ray readings. *See Adkins*, 958 F.2d at 52, 16 BLR at 2-65-66; *White*, 23 BLR at 1-4-5. We therefore reject claimant's allegation of error.

Citing *Scott v. Mason Coal Co.*, 289 F.3d 263, 22 BLR 2-373 (4th Cir. 2002) and *Toler v. Eastern Associated Coal Corp.*, 43 F.3d 109, 19 BLR 2-70 (4th Cir. 1995), claimant next argues that the administrative law judge, having found simple pneumoconiosis established, "committed legal error in her consideration of complicated pneumoconiosis by irrationally including the findings of doctors who had not found pneumoconiosis." Claimant's Brief at 13. Claimant's contention lacks merit. First, the administrative law judge explained that she did not rely on the x-ray readings that were negative for simple pneumoconiosis to determine that claimant did not establish complicated pneumoconiosis. Order Declining to Vacate Decision and Order Denying Benefits on Subsequent Claim (Order) at 2. Second, the administrative law judge explained that she found that claimant's CT scans did not establish the existence of complicated pneumoconiosis because Dr. Alexander stood alone in diagnosing complicated pneumoconiosis, and that therefore "his opinion regarding the CT scans was not persuasive." Order at 2; Decision and Order at 19. Third, the administrative law judge explained that she did not credit Dr. Cohen's medical opinion diagnosing complicated pneumoconiosis because Dr. Cohen had merely relied on Dr. Alexander's interpretations, and because Dr. Zaldivar's opinion diagnosing simple pneumoconiosis was better supported. Order at 2-3. Thus, contrary to claimant's contention, the administrative law judge did not rely on opinions that claimant did not have simple pneumoconiosis to find that he did not have complicated pneumoconiosis.

Moreover, the administrative law judge had to consider all relevant evidence on the question of complicated pneumoconiosis. *Lester*, 993 F.2d at 1145-46, 17 BLR at 2-117-18; *Melnick*, 16 BLR at 1-33-34. Claimant's reliance on *Scott* and *Toler*, cases which did not address the irrebuttable presumption of total disability due to pneumoconiosis, is inapposite.[2]

Finally, claimant contends that the administrative law judge violated the Administrative Procedure Act (APA), 5 U.S.C. §557(c)(3)(A), 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), by failing to provide a rationale for her finding that the medical opinion evidence did not establish that claimant is totally disabled. Based on our review of the administrative law judge's decision, we conclude that she adequately explained her reasoning. *See Lane Hollow Coal Co. v. Director, OWCP [Lockhart]*, 137 F.3d 799, 803-04, 21 BLR 2-302, 2-310-12 (4th Cir. 1998).

After finding that claimant did not establish total disability by either pulmonary function studies or blood gas studies, the administrative law judge considered five medical reports. Drs. Ranavaya, Branscomb, and Zaldivar opined that claimant has minimal or no respiratory or pulmonary impairment and is not totally disabled. Director's Exhibits 14, 21; Employer's Exhibit 2 at 21-28; Employer's Exhibit 3 at 49, 50, 54; Employer's Exhibit 4. Dr. Pfister stated that claimant is "disabled due to occupational pneumoconiosis," Director's Exhibit 24, but the administrative law judge noted that "disabled" did not equate to a finding of total disability, and, moreover, she permissibly found Dr. Pfister's opinion "wholly unreasoned." Decision and Order at 21; *see Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 533, 21 BLR 2-323, 2-335 (4th. Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 441, 21 BLR 2-269, 2-275-76 (4th Cir. 1997).

[2] In *Scott v. Mason Coal Co.*, 289 F.3d 263, 22 BLR 2-372 (4th Cir. 2002), which addressed the weighing of medical opinions as to the cause of a miner's total disability, the court held that where an administrative law judge has found the existence of pneumoconiosis arising out of coal mine employment established, and a physician opines that the miner has neither clinical nor legal pneumoconiosis, the administrative law judge may not credit that physician's medical opinion that pneumoconiosis did not cause the miner's disability "unless the [administrative law judge] can and does identify specific and persuasive reasons for concluding that the doctor's judgment" on causation "does not rest upon her disagreement with the [administrative law judge's] finding . . . ." *Scott*, 289 F.3d at 269, 22 BLR at 2-384, quoting *Toler v. Eastern Associated Coal Corp.*, 43 F.3d 109, 116, 19 BLR 2-70, 2-83 (4th Cir. 1995).

Dr. Cohen opined that claimant has respiratory impairments that would prevent him from performing his usual coal mine employment as a thermo dryer operator. Claimant's Exhibit 5 at 11-12. The administrative law judge rationally considered that although Dr. Cohen is a Board-certified pulmonologist, Dr. Zaldivar is "equally qualified." Decision and Order at 21; *see Hicks*, 138 F.3d at 533, 21 BLR at 2-335; *Akers*, 131 F.3d at 441, 21 BLR at 2-275-76. The administrative law judge concluded that because Dr. Zaldivar's opinion was supported by those of Drs. Ranavaya and Branscomb, "the physician opinion evidence does not support a finding of total respiratory disability." Decision and Order at 21. Since the administrative law judge provided her reasons for finding that the medical opinion evidence did not establish that claimant is totally disabled, we reject claimant's allegation of error. *See Lockhart*, 137 F.3d at 803-04, 21 BLR at 310-12.

Therefore, we affirm the administrative law judge's findings that claimant did not establish the existence of complicated pneumoconiosis pursuant to 20 C.F.R. §718.304, or that he is totally disabled pursuant to 20 C.F.R. §718.204(b). Thus, we affirm the denial of benefits. *See Anderson*, 12 BLR at 1-112.

Accordingly, the administrative law judge's Decision and Order Denying Benefits on Subsequent Claim and Order Declining to Vacate Decision and Order Denying Benefits on Subsequent Claim are affirmed.

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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JUDITH S. BOGGS
Administrative Appeals Judge